fund size.[469]

164. As the Bureau explained in the *Bureau TRS Order*, the reduction in the per-minute VRS compensation rate resulted from the Bureau's disallowance of certain costs submitted by the providers, which the TRS fund administrator had included in setting the proposed VRS compensation rate. These costs fell into the categories of profits, taxes, labor costs, and engineering costs.[470] The total amount of disallowed costs was $25,920,402, which the Bureau subtracted from the TRS fund administrator's projected total costs of providing VRS of $52,659,750. As a result, dividing the total *allowable* projected costs ($26,739,348) by the total projected minutes of use (3,449,938),[471] the Bureau arrived at a per-minute VRS compensation rate of $7.751, which it established as the interim VRS compensation rate in the *Bureau TRS Order*.[472] The Bureau stated that "[t]his rate will remain in force until we complete our examination of actual and projected cost data submitted by VRS providers, after which time we will produce the final VRS cost recovery rate for the July 1, 2003, through June 30, 2004, TRS fund year."[473]

165. On July 30, 2003, five parties filed petitions for reconsideration.[474] Each of these parties challenges the adoption of the VRS compensation rate of $7.751 per minute, and requests that the Commission accept NECA's proposed compensation rate of $14.023, retroactive to July 1, 2003. The parties' arguments can be summarized as follows. First, some of the parties argue that the *Bureau TRS Order* was beyond the authority of the Consumer & Governmental Affairs Bureau under its delegated authority. Second, the parties make various arguments in asserting that the *Bureau TRS Order* was not based on a reasoned analysis, and therefore is arbitrary and capricious. Third, several parties make various arguments that the *Bureau TRS Order* was inconsistent with Section 225 of the Communications Act. Finally, one provider makes specific arguments with respect to the treatment of certain of its costs and expense data.

166. We have reviewed the arguments made by the various parties challenging the Bureau's adoption of an interim VRS per-minute compensation rate of $7.751, rather than the $14.023 proposed by NECA, the comments filed in response to these petitions,[475] as well as supplemental cost data submitted by some of the providers. For the reasons set forth below, we affirm the interim TRS compensation rates set forth in the *Bureau TRS Order*. With respect to the compensation rates for traditional TRS and IP Relay, and STS, we adopt the interim compensation rates as the final compensation rates for those services for the July 1, 2003, through June 30, 2004, period.[476] With respect to VRS, however, our review of the more complete cost data submitted by the providers, which was not available to the Bureau when

[469] *See Bureau TRS Order* at ¶ 1.

[470] *Id.* at ¶ 34.

[471] Because the Bureau excluded certain providers' data in its entirety in setting the interim VRS compensation rate, it also excluded 305,385 minutes of projected VRS use. *See id.* at ¶ 37 & n.96.

[472] *Id.* at ¶ 37.

[473] *Id.* (footnote omitted).

[474] These petitions were filed by Sprint, AT&T, Sorenson Media, Inc. (Sorenson), Hands On, and CSD.

[475] Six parties filed comments in response to the petitions for reconsideration. Comments were filed by Hamilton, TDI (joined by several "supporting parties"), the National Alliance of Black Sign Language Interpreters (NAOBI), Hands On, NorCal Center on Deafness (NorCal), and the Registry of Interpreters for the Deaf (RID). Of these comments, four support adopting NECA's proposed compensation rate of $14.023 per minute for VRS. Additionally, 76 individuals filed brief comments. Of these, 69 supported reconsidering the *Bureau TRS Order* and adopting the NECA proposed VRS compensation rate (20 of these comments are identical), five expressed general support for VRS but did not address VRS compensation rates, and one recommended lowering the VRS compensation rate. We address the relevant comments further below. No reply comments were filed.

[476] We note that no parties challenged the interim compensation rates for those TRS services.

the *Bureau TRS Order* was issued, leads us to modify the VRS compensation rate. For the reasons set forth below, we increase the per-minute compensation rate for Video Relay Service from the interim compensation rate of $7.751 per minute to $8.854 per minute. Because the modified compensation rate of $8.854 is based on data we received after the *Bureau TRS Order* was released, the new compensation rate shall apply to the provision of eligible VRS services effective September 1, 2003.[477]

2. The Bureau's Authority to Adopt the *Bureau TRS Order*

167. Two parties assert that the Consumer & Governmental Affairs Bureau exceeded its delegated authority in rejecting NECA's proposed VRS compensation rate and adopting the substantially lower interim VRS compensation rate.[478] Sprint asserts that "the Bureau cannot decide '[m]atters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines.'"[479] Sprint states that the Commission has never before established interim compensation rates for TRS service, although Sprint admits that the Commission has in the past prescribed retroactive rate increases. Sprint argues that in the *Bureau TRS Order* the Bureau departs from past practice with no discussion of its authority to establish interim compensation rates, or of the procedures it will use or the timetable it will follow to establish final compensation rates.[480] Sprint further argues that the Bureau's approach to setting the interim VRS compensation rate is unprecedented, particularly the use of rate of return on investment rather than cost-plus profit markup in the interim VRS compensation rate calculation.[481] Sprint asserts that the Bureau's claim that markup over expenses is not authorized by the Commission's rules is not supported by any rule proscribing this method, and states that the cost-plus markup has been the Commission's consistent past practice. Sprint concludes that although the Commission does have the authority to subject VRS providers to rate-of-return regulation, it must do so by rulemaking, and that the Bureau may not apply a rate-of-return on investment calculation to VRS without a prior Commission rulemaking.[482]

168. Hands On argues that the Commission's rules on the functions of the Consumer & Governmental Affairs Bureau "contain[] no provision relating to the setting of interim rates" and, "[i]ndeed, ... contain[] no reference to rate making at all, either generally or in connection with the Bureau's functions relating to persons with disabilities."[483] Further, Hands On agrees with Sprint that the Bureau lacks the authority to decide matters that present novel questions.[484] Hands On asserts that "[i]t is plainly apparent from the Bureau's statements in the *Order* that novel questions of law fact [sic] and policy are presented here. ...The most glaring is that of the denial of profit and the proscription [sic] of a[n] 11.25[%] rate of return on investment only. As the Bureau admits[,] the FCC's rules are silent on these matters. Thus, these matters should not have been decided under delegated authority."[485]

169. As a threshold matter, pursuant to Section 225 and the implementing regulations the

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[477] We note that we address below in the *FNPRM* the open question of the appropriate cost recovery *methodology* for VRS, *i.e.*, whether VRS providers should continue to be compensated on a per-minute basis, as is the case with the other types of TRS, or on some other basis (*e.g.*, lump sum).

[478] *See* Sprint *Petition* at 9-12; Hands On *Petition* at 10.

[479] Sprint *Petition* at 9 (quoting 47 C.F.R. § 0.361(c)).

[480] *Id.* at 9.

[481] *Id.* at 9-10.

[482] *Id.* at 11-12.

[483] Hands On *Petition* at 10.

[484] *Id.*

[485] *Id.*

Commission does not engage in "rate making" in determining the compensation that will be paid from the Interstate TRS Fund for providers' "reasonable costs" of providing TRS. The Commission's rules state that "TRS Fund payments shall be distributed ... based on formulas approved or modified by the Commission. Such formulas shall be designed to compensate TRS providers for reasonable costs of providing interstate TRS, and shall be subject to Commission approval."[486] Therefore, the Commission has the authority to modify the payment formulas of NECA.

170. The Commission, by this *Order*, affirms the cost recovery methodology for VRS established in the *Bureau TRS Order*. Relatedly, we note that our TRS regulations presently refer to the authority of the Chief of the Wireline Competition Bureau (WCB) over certain matters concerning the Interstate TRS Fund and state certification.[487] Consistent with section 0.141(f) of our rules, as noted above, the Consumer & Governmental Affairs Bureau actually performs this function. Consequently, we amend our TRS regulations to replace the three references to the "Wireline Competition Bureau" with the "Consumer & Governmental Affairs Bureau."[488]

3. The *Bureau TRS Order* is Based on Reasoned Analysis

171. Petitioners make several arguments that fall under the rubric that the *Bureau TRS Order* is not based on reasoned analysis, and therefore is arbitrary and capricious and in violation of the Administrative Procedure Act.[489] We address these arguments in turn.

a. The comparison of the costs of VRS with the costs of Video Remote Interpreting (VRI)

172. All of the petitioners note that the Bureau compared the costs of VRS with the costs of Video Remote Interpreting (VRI),[490] and assert that VRS and VRI are not, contrary to the *Bureau TRS Order*, "essentially the same" service.[491] Sprint, for example, points out that VRI is available only during

[486] 47 C.F.R. § 64.604(c)(5)(iii)(E).

[487] *See* 47 C.F.R. §§ 64.604(c)(5)(iii)(B) & (I); 64.605(a).

[488] *See* Appendix D; *see also* 5 U.S.C. § 553(b) (notice and comment rulemaking requirements do not apply to rules of agency organization, procedure, or practice).

[489] "[T]he reviewing court shall ... hold unlawful and set aside agency actions, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; ... in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A) & (C).

[490] Although sometimes also referred to as "Video Relay Interpreting," we use the phrase "Video Remote Interpreting" (VRI), as we believe it more actually describes this service. *Cf. Bureau TRS Order* at ¶ 30 & n.78. As we have explained, VRI is used "to conduct in-person communications through sign language interpreters that are located in remote locations." *Bureau TRS Order* at ¶ 30 (quoting *Telecommunications Relay Service and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order on Reconsideration, CC Docket No. 98-67, FCC 00-200, 16 FCC Rcd 4054 at ¶ 10 (June 5, 2000)). For example, at a business meeting, VRI can be used to enable a hearing person to communicate with a deaf person when they are in the same room and an interpreter is not available. In this instance, for example, the hearing person would call a remote VRI service (*i.e.*, a sign language interpreter), set up a video connection, and communicate with the deaf person through the sign language interpreter who is at a remote location; the deaf person and the interpreter would see each other and communicate in sign language through the video connection. By contrast, VRS, as a form of relay service, is a means by which a person with a hearing disability, who absent the hearing disability would make a voice telephone call, makes a call through a relay center using a VRS communications assistant to communicate with another person (or vice versa).

[491] *Bureau TRS Order* at ¶ 30; *see* AT&T *Petition* at 4-5; CSD *Petition* at 9; Hands On *Petition* at 8-9; Sorenson *Petition* at 5; Sprint *Petition* at 14-15.

normal business hours, where VRS is on-demand for extended hours, in some cases 24 hours per day.[492] Further, petitioners state that there are technological, regulatory, and security issues involved in VRS that do not apply to VRI.[493] Petitioners therefore either assert or suggest that that comparing VRS with VRI is not a proper basis for reducing the VRS interim compensation rate.[494]

173. Petitioners and commenters misread the *Bureau TRS Order* in asserting that the comparison between VRS and VRI was a basis for the reduction of the VRS compensation rate. The Bureau did compare the compensation rates of these two services, noting that the cost of VRS is more than five times that of VRI.[495] The Bureau also stated that "the Commission recognizes that there may be several factors that justify a VRS compensation rate that is higher than that for VRI."[496] But the Bureau made clear that this comparison was not the basis (or even "a" basis) for its modification of the compensation rate proposed by NECA. Rather, the Bureau stated that "we have examined the providers' cost data underlying NECA's proposed rate ... [and] we conclude that the providers' cost data cannot support the proposed compensation rate of $14.023 per-minute."[497] Further, the Bureau "identified a variety of areas that warrant adjustment to the proposed costs."[498] Finally, the Bureau found "that adjustments made in a number of areas – most significantly, profit calculations, taxes, and labor costs – taken in aggregate, warrant our adjustment to the VRS compensation rate."[499]

174. These statements make clear that the sole basis of the Bureau's modification of the proposed VRS compensation rate was a review of the cost data provided by VRS providers. Indeed, the *Bureau TRS Order* makes clear that the comparison of VRS with VRI was simply presented as one factor that lead to concern over the proposed VRS compensation rate, and therefore lead the Bureau to examine NECA's proposed compensation rate and the providers' underlying cost data.[500] Moreover, as we have noted, the Commission has the authority to approve or modify proposed payment formulas,[501] as well as the obligation to ensure that "[s]uch formulas ... [are] designed to compensate TRS providers for *reasonable* costs of providing interstate TRS."[502] A fair reading of the *Bureau TRS Order* makes clear that the basis for the Bureau's modification of the VRS compensation rate was the Bureau's evaluation of the actual cost data and projections submitted by VRS providers, and its conclusion that some of the costs submitted were not "reasonable."

b. The comparison of the proposed VRS compensation rate to historical VRS compensation rates

175. Petitioners similarly assert that, in reducing the compensation rate for VRS to $7.751

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[492] *See* Sprint *Petition* at 15; *see also* Hands On *Petition* at 8; AT&T *Petition* at 7; CSD *Petition* at 9-10; Sorenson *Petition* at 5.

[493] *See* Sprint *Petition* at 15; CSD *Petition* at 10-11; AT&T *Petition* at 8; Hands On *Petition* at 8-9, Exh. 1.

[494] *See* TDI Comments at 11-13; NorCal Comments at 1; Hamilton Comments at 2-3; *see also* Hands On Comments at 2.

[495] *See Bureau TRS Order* at ¶ 30.

[496] *Id.*

[497] *Id.* at ¶ 32.

[498] *Id.* at ¶ 34.

[499] *Id.*

[500] *Id.* at ¶ 32.

[501] *See* 47 C.F.R. § 64.604(c)(5)(iii)(E).

[502] *Id.*

per minute, the Bureau incorrectly relied on the fact that the per-minute compensation rate for TRS more than tripled in a two-year period. Petitioners assert that the reasons for this increase are readily explainable and do not provide any basis to reduce the compensation rate proposed by NECA.[503] For example, Hands On notes that VRS service was not provided until the compensation rate rose to $9.614 in August 2001.[504] CSD asserts that when VRS was recognized as a form of TRS in March 2000 the service was considerably different from current VRS service, and that costs were lower in the early days of VRS because the service was offered for more limited hours and from fewer locations.[505]

176. Petitioners again misread the *Bureau TRS Order* to the extent they suggest that the history of increasing VRS compensation rates was the principal reason, or even a reason, that the Bureau modified the VRS compensation rate that NECA had proposed. On the contrary, the Bureau's discussion of the trend of the VRS compensation rates was not a basis for the modification of the VRS compensation rate. In the *Bureau TRS Order*, the Bureau noted that in initially authorizing cost recovery for all VRS calls from the Interstate TRS Fund, and in subsequently granting waivers of certain TRS mandatory minimum standards as applied to VRS, the Commission intended to reduce the costs of providing VRS as VRS technology developed and the service was refined.[506] In sum, while the high compensation rate for VRS led the Bureau to demand cost data from the providers, it was the provider's cost data – not the trends in compensation rates – that led the Bureau to modify NECA's proposed VRS compensation rate.

c. The disallowance of profit and use of 11.25% rate of return on investment

177. In reviewing the providers' cost data, the Bureau noted that the "profits and tax allowances claimed by all VRS providers equal a markup of 27.2% of the total underlying VRS expenses," and that the "basis for these profit claims is a percentage of total estimated VRS expenses."[507] The Bureau stated that "[t]his basis is neither described nor authorized under our rules," and therefore applied the 11.25 % rate of return on investment the Commission has established in related contexts, plus applicable tax allowances.[508]

178. Petitioners argue that the exclusion of profits as a legitimate cost for purposes of determining the VRS reimbursement rate was improper. Sprint asserts that the Bureau cited no basis for rejecting the VRS providers' profit markup, and cited no Commission authority proscribing the "cost-plus" methodology used by VRS providers to calculate profit.[509] Sprint further asserts that NECA has never required VRS providers to furnish it with data under Part 32 of the Commission's rules that would enable the Bureau to calculate an investment base to which to apply a rate of return.[510] Sprint and other petitioners also argue that the 11.25% return on investment allowance that the Bureau adopted is

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[503] *See* AT&T *Petition* at 6-7; CSD *Petition* at 7-8; Hands On *Petition* at 7-8; Sorenson *Petition* at 3; Sprint *Petition* at 16.

[504] *See* Hands On *Petition* at 7.

[505] *See* CSD *Petition* at 8; *see also* Sprint *Petition* at 16.

[506] *Bureau TRS Order* at ¶ 31. In this regard, we also note that in NAD's comments to the May 1998 NPRM preceding the March 2000 *Improved TRS Order & FNPRM,* it asserted that as the use of VRS increased, the costs of providing this service would be "drive[n] down." Comments of the National Association of the Deaf and the Consumer Action Network, CC Docket Nos. 90-571 & 98-67 (filed July 20, 1998). That has not been the case.

[507] *Id.* at ¶ 35. We note that of the $25,920,402 in total VRS costs we disallowed (of NECA's projected costs of $52,659,750), almost $11 million was for the adjustment to profits and tax allowances.

[508] *Id.*

[509] *See* Sprint *Petition* at 9-10.

[510] *Id.*

inappropriate because it is the return on investment allowed for local exchange carriers (LECs), and the nature and costs of VRS providers are very different from those of LECs.[511] Hamilton and Hands On also argue that the 11.25% rate of return on investment calculation is inapplicable to the providers' costs of providing VRS and an improper basis for reducing the NECA proposed rate.[512] Hands On states that the 11.25% rate of return on investment allowance was prescribed for dominant carriers in a capital-intensive industry, and is not appropriate for a "labor intensive enterprise such as VRS."[513] Hands On also suggests that government contracting provides a better analogy, where "a reasonable profit is an expected component of a contract price."[514]

179. We do not find petitioners' arguments persuasive. As an initial matter, we note that what the parties mean by "profit" is a markup on expenses; *i.e.*, a return based upon a percentage of total TRS costs that is not itself a cost of providing TRS service. We reject that methodology in this context, *i.e.*, when a TRS provider is seeking payment from the Interstate TRS Fund. First, and most fundamentally, this methodology ignores the role of TRS as an accommodation under Title IV of the ADA for persons with disabilities. It is in this context that Congress provided that TRS providers could recover their "costs."[515] In other words, because Title IV places the obligation on carriers providing voice telephone services to *also* offer TRS to, in effect, remedy the discriminatory effects of a telephone system inaccessible to persons with disabilities, the costs of providing TRS are really just another cost of doing business generally, *i.e.*, of providing voice telephone service. For this reason, the annual determination of the TRS compensation rates is not akin to a rate-making process that determines the charges a regulated entity may charge its customers. Rather, it is a determination of a per-minute compensation rate that will cover the reasonable costs incurred in providing the TRS services mandated by Congress and our regulations.

180. Further, Sprint's assertion that nothing in the Commission's rules prohibits "cost-plus" profit calculations is beside the point. Sprint raises this argument in response to the Bureau's statement that the Commission's rules do not authorize profits as part of TRS costs.[516] Sprint's argument amounts to a statement that any cost not expressly prohibited by the Commission's rules is a permissible VRS cost. In view of the history and purpose of Title IV, we cannot adopt such a position. Moreover, such a position would require us to set forth in the rules a laundry list of prohibited costs. The rules, of course, take a different course by providing that TRS payment "formulas shall be designed to compensate TRS providers for reasonable costs" of providing service.[517] We follow that guidance in concluding that, in the context of Title IV of the ADA, "reasonable costs" do not include a mark-up on the reasonable costs claimed.

181. In this context, therefore – *i.e.*, when Congress has instructed that certain regulated entities must provide an accommodation for persons with disabilities and may seek compensation for their costs of doing so – we believe "reasonable costs" must be construed to be those direct and indirect costs

[511] *See* AT&T *Petition* at 8; CSD *Petition* at 7; Hands On *Petition* at 10-13; Sprint *Petition* at 11-12. Sprint contrasts, for example, the application of rate of return regulation to dominant LECs providing service for which there is stable demand, with its application to VRS providers facing the risks of offering the service in a competitive market with unpredictable demand. Sprint *Petition* at 11.

[512] *See* Hamilton Comments at 3-4; Hands On Comments at 3.

[513] Hands On *Petition* at 11.

[514] *Id.* at 12.

[515] *See* 42 U.S.C. § 12101(a)(3) & (5); 47 U.S.C. § 225(d)(3); *see also* H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. at 129-131 (1990) (House Report).

[516] *See* Sprint *Petition* at 10.

[517] 47 C.F.R. § 64.604(c)(5)(iii)(E).

necessary to provide the service consistent with all applicable regulations governing the provision of the service, *i.e.*, the TRS mandatory minimum standards.[518] We therefore find that such "reasonable costs" do not include an additional sum that represents a markup on those costs. Reasonable costs may include, however, a return on capital investment.

182. With regard to the rate of return on capital investment, in applying an 11.25% rate of return on investment to the TRS scheme we are not prescribing a separate rate of return specifically for TRS. Rather, we are using the Commission's current rate of return on investment that the Commission has applied in a wide range of telecommunications contexts.[519] Therefore, it is irrelevant whether the provider solely provides TRS (or VRS) or provides it along with other telecommunications services. Providers claiming this rate of return on net VRS assets, plus an appropriate tax allowance, will not be challenged. As we have noted, providers are permitted to recover all used and useful direct *costs* relating to VRS, as well as all reasonable overhead costs.[520] We also allow this rate of return on capital investment as a means of ensuring that providers are not left to finance reasonable investment in VRS

[518] This conclusion is consistent with the Commission's treatment of the recovery of costs in other contexts. For example, pursuant to Section 251(e)(2) of the Communications Act, the Commission is required to "ensure that carriers bear the costs of providing long-term number portability [LNP] on a competitively neutral basis," and to provide for the recovery of these costs. 47 U.S.C. § 251(e)(2); *see Telephone Number Portability and Cost Classification Proceeding*, Memorandum Opinion and Order, CC Docket No. 95-116, DA 98-2534, 13 FCC Rcd 24495 (Dec. 14, 1998) (*LNP MO&O*); *Telephone Number Portability*, Third Report and Order, CC Docket No. 95-116, FCC 98-82, 13 FCC Rcd 11701 (May 12, 1998) (*LNP Third Report & Order*). We have adopted a two-part test "for identification of the carrier-specific costs that are directly related to the implementation and provision of telephone number portability, that is, eligible LNP costs." *LNP MO&O* at ¶ 10. Under this test, "to demonstrate that costs are eligible for recovery ... a carrier must show that these costs: (1) would not have been incurred by the carrier but for the implementation of number portability; and (2) were incurred for the provision of number portability service." *Id.* (internal quotation marks omitted); *see also LNP Third Report & Order* at ¶¶ 72-77.

[519] In this regard, we note that petitioners are not correct in suggesting that the 11.25% rate of return allowance applies only in the context of dominant local exchange carriers. *See Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, Order, CC Docket No. 89-624, FCC 90-315, 5 FCC Rcd 7507 at ¶ 13 (Dec. 7, 1990). *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order, and Order on Reconsideration of the Second Report and Order, CC Docket 96-128, FCC 02-39, 14 FCC Rcd 2545 at n.410 (Feb. 21, 2002) (appropriate rate of return for capital investment in coinless pay phones); *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers; Federal-State Joint Board on Universal Service; Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation; Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers (LEC Universal Service)*, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, FCC 01-304, 16 FCC Rcd 19613 at ¶ 206 (Nov. 28, 2001) (rate of return for Universal Service); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Report, CC Docket No. 98-146, FCC 02-33,17 FCC Rcd 2844 at ¶ 140 (Feb. 6, 2002) (rate of return for telephone service providers in small and rural communities); *Telephone Number Portability*, Third Report and Order, CC Docket No. 95-116, FCC 98-82, 13 FCC Rcd 11701 at ¶ 143 (May 12, 1998) (rate of return on capital outlays for number portability); 47 C.F.R. § 76.922(e)(3)(i) (cable rate adjustments to compensate for earlier underestimates entitled to 11.25% interest); 47 C.F.R. § 76.942(f) (refund of fees from cable local franchise authority includes 11.25% interest rate).

[520] We note that although recoverable costs may include those corporate overhead costs directly attributable to the provision of TRS, we are concerned about the extent to which some salaries of corporate officers and executives have been included in submitted costs. We therefore will instruct the TRS fund administrator to request that providers identify the corporate officers and executives whose salaries have been included in the submitted overhead costs, and delineate the percentage of such persons' salaries that the provider maintains is attributable to the provision of TRS.

assets out-of-pocket.[521] It therefore represents, in a very real sense, the cost of capital, and as a cost-based item it is compensable under the TRS scheme. We affirm, therefore, the Bureau's finding that an average markup of 27.2% on all VRS costs incurred is inconsistent with the intent of the statutorily mandated TRS cost recovery scheme; such a markup is plainly not cost-based. Moreover, it discourages prudent cost control, and is largely accountable for the excessive cost of VRS that was proposed to us in May prior to the Bureau's release of the *Bureau TRS Order*.[522] Finally, contrary to Sprint's assertion, it is not incumbent upon the Commission to conduct studies to establish an appropriate markup for VRS when it clear from Title IV that TRS providers are entitled to be compensated only for their costs of providing the service.

d. The adjustments to the providers' cost data

(i) The Bureau's explanation of its adjustments to the cost data

183. In adjusting the VRS per-minute compensation rate, the Bureau reviewed the cost data submitted by the VRS providers and identified three areas in which some or all of the costs reported were not reasonable: profit calculations, taxes, and labor costs.[523] The Bureau therefore excluded some of these costs in calculating the interim VRS compensation rate. The Bureau also rejected certain engineering costs submitted by one of the providers. Petitioners make several generalized arguments in challenging these adjustments and the adoption of the interim compensation rate.

184. Sorenson asserts that the *Bureau TRS Order* does not provide a sufficient explanation of the analysis used to determine the interim compensation rate. Sorenson asserts that, in contrast to the *Bureau TRS Order*, the compensation rate proposed by NECA was based on straightforward analysis of cost data, and suggests that instead of adopting an interim compensation rate the Bureau should have sought further data after providing more specific guidance to the providers.[524] Sorenson further asserts that the Bureau's offer to meet with the VRS providers to discuss the adjustments to their cost data is

[521] Hands On argues that we should analogize to government contracting, where reasonable profit is an expected component of a contract price, in determining whether TRS providers are entitled to recover "profit." *See* Hands On *Petition* at 12. We do not believe that such an analogy is appropriate. First, the government does not contract with VRS providers to provide the service; to the contrary, Congress mandated the provision of TRS as a condition of voice telephone providers being permitted to begin or continue in that business. Second, we have explained the nature of TRS as an accommodation that is required of telecommunications providers, just as other accommodations for persons with disabilities are required by the ADA of businesses and local and state governments. With respect to TRS, Congress chose to adopt a mechanism for compensation of TRS providers that allows them to be paid by all subscribers for interstate services. *See* 47 U.S.C. § 225(d)(3)(B). A more appropriate analogy, therefore, would be that businesses increase the price of all goods or services sold in order to pay for the accommodations required by law, or that a state or local government increases taxes for all taxpayers to fund necessary accommodations.

[522] We are aware that some common carriers use a subcontractor arrangement to provide VRS. To the extent the argument is suggested that a common carrier would be unable to engage a subcontractor without ensuring that the subcontractor receives some "profit" for its services, that argument has no bearing on our conclusion that the Interstate TRS Fund compensates TRS providers only for the reasonable costs of the providing the service. If subcontractors were an exception to the rule that TRS providers are only entitled to their reasonable costs in providing the service, the exception would likely ultimately swallow the rule and present the recurring issue whether the subcontract arrangement was an arms-length transaction or instead a means by which a provider can obtain markups indirectly that it is precluded from obtaining directly. Further, with particular respect to VRS, we note that it is not a required service, and therefore the providers' initial decision to offer the service, like their decision to then subcontract out the service, is entirely of their own choosing.

[523] *See Bureau TRS Order* at ¶ 34.

[524] *See* Sorenson *Petition* at 4.

insufficient to meet the Commission's obligation to engage in reasoned decision making.[525] AT&T similarly contends that although the Bureau stated that it excluded some data because it was predicated on incorrect assumptions, the Bureau did not explain the "nature or the magnitude of the erroneous information."[526] Both petitioners request that we adopt the NECA-proposed compensation rate of $14.023 per minute for VRS.[527]

185. We agree that the Bureau had an obligation to provide sufficient information in the *Bureau TRS Order* to allow the public to understand the reasoning behind the Bureau's modification of the VRS compensation rate. We find, however, that the information provided by the Bureau is sufficient to allow such an understanding. First, we note that petitioners do not challenge the methodology by which NECA arrived at its proposed TRS compensation rates, and that the Bureau followed the same methodology but simply disallowed some of the underlying cost submitted by the providers. That methodology requires the totaling of all of the providers' submitted costs, and the division of that number by the total number of projected VRS minutes.[528] The Bureau explained that it reviewed the cost data submitted by NECA, and disallowed tax allowances,[529] replaced the VRS providers' profit markups with an 11.25% rate of return on capital investment, and adjusted labor costs to account for inefficiencies in the labor cost submissions of some VRS providers.[530] The Bureau then divided the resultant total by the projected number of VRS minutes, and arrived at the modified VRS compensation rate of $7.751 per minute.

186. Specific dollar amounts for each VRS provider were not given in the *Bureau TRS Order* because the VRS providers requested confidential treatment for their cost data. Therefore, cost figures and projected minutes were calculated in the aggregate.[531] This, however, is not a variation from NECA's method of determining a proposed VRS compensation rate, which also uses aggregate amounts. Moreover, the Bureau offered to meet with each VRS provider to explain precisely which costs submitted by that provider were disallowed.[532] Because no party other than one of the VRS providers has requested a specific numerical breakdown of the disallowed costs, and because VRS providers were given ample opportunity to discuss which specific cost categories and dollar figures were disallowed, we find that the explanation given by the Bureau of its reasoning in the *Bureau TRS Order* is sufficient. We note that no petitioner chose to dispute the exact calculation of each cost adjustment to its cost data, but rather challenged the replacement of profit markups with a figure of 11.25% rate of return on capital investment,[533] the comparison of VRS with VRI,[534] and the reference to historical VRS compensation rates in the *Bureau TRS Order*.[535] We therefore find that, in the circumstances of this proceeding, the

[525] *See* Sorenson *Petition* at 5 (citing *Brookings Municipal Telephone Co. v. FCC*, 822 F.2d 1153, 1165 (D.C. Cir. 1987)).

[526] *See* AT&T *Petition* at 9.

[527] *See* Sorenson *Petition* at 9-10; AT&T *Petition* at 11.

[528] *See Bureau TRS Order* at ¶¶ 8-10.

[529] *Id.* at ¶ 35-37.

[530] *See id.* The Bureau also disallowed certain engineering costs it found unreasonable (discussed below), and excluded some data from providers entirely, based on its assessment that the data were erroneous or unreliable.

[531] *See id.* at ¶ 33.

[532] *See id.* at ¶ 33 n.91. Several such meetings took place at the request of the providers.

[533] *See* AT&T *Petition* at 8; CSD *Petition* at 7; Hands On *Petition* at 10-13; Sprint *Petition* at 11-12.

[534] *See* AT&T *Petition* at 4-5; CSD *Petition* at 9; Hands On *Petition* at 8-9; Sorenson *Petition* at 5; Sprint *Petition* at 14-15.

[535] *See* AT&T *Petition* at 6-7; CSD *Petition* at 7-8; Hands On *Petition* at 7-8; Sorenson *Petition* at 3; Sprint *Petition* at 16.

Bureau's description of the costs disallowed was sufficient explanation of its reasoning to support its conclusion.

187. Finally, AT&T notes that none of the commenters to the Public Notice issued by the Commission requesting comment on NECA's proposed compensation rates suggested that the VRS compensation rate was excessive,[536] and that six of the ten VRS providers, accounting for 93% of all VRS traffic, submitted cost data supporting very similar VRS compensation rates (ranging from $13.5233 per minute to $14.6917 per minute). AT&T therefore suggests that a figure of approximately $14 per minute is the correct compensation rate for VRS.[537] The fact that the providers' cost data supported a VRS compensation rate within a narrow range, however, does not mean that that compensation rate is necessarily the appropriate one. This is especially true where, as here, the providers' compensation rates were each based on costs that the Bureau concluded were unreasonable and at odds with the purpose and intent of section 225 and the TRS compensation rules.

(ii) Engineering costs

188. In adjusting the underlying cost data, the Bureau disallowed certain engineering and operations support costs. These costs are directed at such matters as improving picture quality, developing software that would be proprietary, and achieving what the providers believe would be full compliance with the Commission's TRS mandatory minimum standards and the functional equivalency mandate.[538] Although the Bureau did find that some of the engineering and software development costs could be properly compensated as capital investment, the Bureau explained to the providers that such costs directed at providing advanced VRS features that fall outside the functional equivalency mandate of section 225 are not compensable from the Interstate TRS Fund as a "reasonable" cost.[539]

189. We find that the Bureau was correct in disallowing engineering expenses directed at research and development, including software development, relating to VRS enhancements that go beyond the applicable TRS mandatory minimum standards. There are limits – inherent in the Title IV scheme – to a provider's costs of developing and implementing TRS enhancements that are compensable from the Interstate TRS Fund. Title IV is intended to ensure that entities that offer telephone voice transmission services *also* offer TRS so that persons with certain disabilities have access to the *functionality* of a voice telephone call. That functionality is defined by the applicable mandatory minimum standards, so that when a provider offers eligible services that meet these standards it may recover its costs of doing so from the Interstate TRS Fund.[540] Although these standards have not been

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[536] *See* AT&T *Petition* at 3.

[537] *See id.* at 9-10.

[538] We address this category of costs only generally because the specific arguments made rely on confidential supplemental data.

[539] As noted further below, all VRS providers were invited to request a meeting with the Bureau to discuss the *Bureau TRS Order* and its exclusion of costs specific to their submission. Because all providers requested confidential treatment of their data, each meeting was conducted separately.

[540] *See* House Report at 133. The House Report explains that section 225 "requires the FCC to establish minimum federal standards to be met by all providers of intrastate and interstate telecommunications relay services, including technical standards, quality of service standards, and the *standards that will define functional equivalence* between telecommunications relay services and voice telephone transmission services. Telecommunications relay services are to be governed by standards that ensure that telephone service for hearing- and speech-impaired individuals is functionally equivalent to voice services offered to hearing individuals. In determining factors necessary to establish functional equivalency, the FCC should include, for example, the requirement that telecommunications relay services transmit messages between the TDD [TTY] and voice caller in real time, as well as the requirement that blockage rates for telecommunications relay services be no greater than standard industry blockage rates for voice telephone services. Other factors that should be included are the opportunity for telecommunications relay (continued....)

static, and will continue to change as technology develops and the forms and types of TRS change, there are not gradations of functional equivalency. For a particular provider, the requirement of functional equivalency is met when the service complies with the mandatory minimum standards applicable to the specific service. In this way, the Interstate TRS Fund does not become an unbounded source of funding for enhancements that go beyond these standards, but which a particular provider nevertheless wishes to adopt. This is particularly important because the funding for such enhancements would have to come from our adoption of a higher carrier contribution factor applicable to providers of all interstate telecommunications services – costs ultimately passed on to all consumers.

190. We believe that this conclusion best reconciles the Commission's interest in avoiding placing undue burdens on the Interstate TRS Fund with the statutory mandate that the Commission's regulations "do not discourage or impair the development of improved technology."[541] Covered entities are encouraged to use and develop new technologies to meet these standards – *i.e.*, to provide the functionality mandated by the statute. But at the same time, we do not believe that the Interstate TRS Fund was intended to be a source of funding for the development of TRS services, features, and enhancements that, although perhaps desirable, are not necessary for the provision of functionally equivalent TRS service as an accommodation for persons with certain disabilities.[542] Indeed, such a result would be especially problematic with respect to the provision of forms of TRS – such as VRS – that we have permitted but have not mandated.[543]

(iii) The providers' supplemental data

191. In the *Bureau TRS Order*, the Bureau explained that the VRS compensation rate it was adopting was an "interim" compensation rate that would remain in force until the Bureau completed its examination of the cost data submitted by the providers and other supplemental submissions.[544] We have reviewed all of the supplemental cost data submitted by the providers.[545] As noted above, because all of the providers filed for confidential treatment, the adjustments made are described in the aggregate. We note that the quality of the supplementary data we received varied considerably, and that this significantly affected our determinations. While we found that some of the supplemental data submitted by providers successfully resolved specific concerns described in the *Bureau TRS Order*, other submissions were inadequate to address the concerns raised. First, the Bureau found that interpreter salaries submitted by certain providers appeared to be overstated relative to the number of reimbursable minutes budgeted based on actual occupancy and utilization data received from selected providers.[546] Upon review of the

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services users to choose an interstate carrier whenever possible. The FCC should enumerate other such measurable standards to ensure that hearing and non-hearing individuals have equivalent access to the Nation's telephone networks." *Id.* (emphasis added); *see also* 136 Cong Rec. H2421-02 at H2431, 1990 WL 65024 (May 17, 1990) (testimony indicating that the mandatory minimum standards will define functional equivalency).

[541] 47 U.S.C. § 225(d)(2).

[542] Of course, TRS providers are not *prohibited* from offering service enhancements that exceed these standards; the costs for those enhancements are just not reimbursable from the fund.

[543] In addition, we note that, as a general matter, engineering costs cannot be reported as immediate expenses in the year they are incurred. Costs relating to multi-year capital acquisitions, whose benefits clearly last more than one year, should be capitalized, just as the hardware and software they support are capitalized. Treatment of these costs as period costs for a single year results in overstating the VRS costs for that year.

[544] *Bureau TRS Order* at ¶ 37 & n.97.

[545] Supplemental cost data was submitted by Hamilton, Hands On, Sorenson, Sprint, and CSD.

[546] *Bureau TRS Order* at ¶ 36. The "occupancy" rate is the portion of time during a work period that a VRS CA spends at a workstation, available to relay VRS calls, and excludes breaks, meals, vacations, training, and other non-
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supplementary materials submitted by these providers, we sustain the prior disallowances made by the Bureau because budgeted and actual experience continue to be at odds, and in some instances the specific inefficiencies that the Bureau communicated to providers were not addressed. Second, the Bureau disallowed some data as unreliable because it contained various errors or was predicated on incorrect assumptions.[547] In response to the Bureau's action, several providers submitted supplemental information to correct this data, which included revised staffing plans to establish a reasonable consistency between labor costs and reimbursable service time.[548] Upon review of this supplemental data, we have allowed additional salary reimbursements based on data that established reasonable consistency between budgeted salaries, budgeted reimbursable minutes, and actual experience.

192. We also restored some costs that related to engineering support. Although, as noted above, engineering costs that are incurred at the election of a provider in order to exceed the mandatory minimum standards, or that lead to the development of proprietary products, are not permitted, we find that some recurring costs are necessary to ensure that VRS assets are properly maintained and to allow providers to meet the minimum technical standards that we prescribe.[549] Upon review of the supplemental data, we have permitted additional reimbursements on this basis. In addition, some providers submitted supplemental data related to capital costs that the providers had not claimed previously. We are accepting this data and, consistent with our discussion above, are allowing the 11.25% rate of return plus corresponding tax allowances to be applied to the newly submitted capital costs.[550] Finally, one provider, whose data was previously excluded in its entirety, provided significantly improved supplementary data that we have included in our final calculations.

193. In sum, we have determined overall that the supplementary filings justified the recovery of an additional $9,503,801 in VRS costs, with a corresponding increase of 213,415 in net reimbursable minutes. Total allowable VRS costs and reimbursable minutes increased to $62,982,497 and 7,113,290 respectively, resulting in a final VRS per-minute compensation rate of $8.854. As we have noted, because this compensation rate is based on information that was submitted after we adopted the *Bureau TRS Order*, the new compensation rate of $8.854 shall apply commencing September 1, 2003, through the

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relaying duties. The "utilization" rate represents the portion of occupancy time in which the VRS CA is actually relaying calls for which the provider can be compensated from the Interstate TRS Fund.

[547] *Id.*

[548] We note that labor costs have been a concern for VRS since its inception, since a provider's costs attributable to VRS CAs are generally substantially more than those attributable to traditional TRS CAs. In this regard, in the *VRS Waiver Order* the Bureau waived for VRS providers the TRS mandatory minimum standard that 85% of all calls must be answered within 10 seconds. *VRS Waiver Order* at ¶¶ 15-16; 47 C.F.R.§ 64.604(b)(2). The Bureau noted that one provider had asserted that application of this rule to VRS would "result in such heavy and costly staffing needs that a prudent TRS operator would be seriously deterred from offering voluntary VRS." *VRS Waiver Order* at ¶ 15 (citing Hamilton *Waiver Request* at 8). Therefore, the waiver allows VRS providers to add new VRS CAs to their workforce only when justified by the volume of VRS calls. *Id.* at ¶ 16. For this reason, providers' arguments seeking to justify labor costs based on the staffing necessary to meet the speed of answer requirement – a requirement waived for VRS – are not well-taken. We also note that we have extended in this *Order*, above, this waiver for VRS of the speed of answer requirement, but the same time we have raised the issue of speed of answer and the provision of VRS in the *FNPRM* below.

[549] *See* 47 C.F.R. §64.604.

[550] We would also consider arguments relating to allowances for net working capital, *i.e.*, allowing a return to be earned on funds required to be retained to finance expenditures until reimbursed (since payments from the TRS fund administrator are paid two months in arrears). Because, however, we did not receive critical information that we requested on this matter, we do not determine at this time whether such an allowance should be permitted under the regulations and, if so, the appropriate amount of such an allowance.

2003-2004 fund year.

4. The *Bureau TRS Order* and the mandates of Section 225

194. Petitioners assert that the *Bureau TRS Order* is inconsistent with section 225. First, Sorenson notes that Section 225(b)(1) directs the Commission to make TRS, including VRS, available "to the extent possible and in the most efficient manner."[551] Sorenson also notes that Congress required that TRS providers be permitted to recover their "fair costs" for providing VRS.[552] Sorenson argues that the interim VRS compensation rate of $7.751 per minute will not allow VRS providers to recover their fair costs, and that therefore they will not be able to provide service to "the extent possible."[553] CSD similarly argues that the interim compensation rate will not provide sufficient flexibility for VRS providers to research and invest in new VRS technologies, thus discouraging or impairing the development of new VRS technology in contravention of section 225.[554]

195. Section 225 provides that "the Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States."[555] Section 225 also provides, as we have noted, that the Commission's implementing regulations shall "encourage ... the use of existing technology and ... not discourage or impair the development of improved technology."[556] These provisions cannot be read in isolation, and do not mean that we must compensate VRS providers for whatever costs they choose to submit, either as a general matter or in pursuit of enhancements that go beyond what is required under the mandatory minimum standards. The guiding principle, as we have noted, is the recovery of "reasonable" costs, and the Commission (and hence the Bureau) has the authority to decide what costs are reasonable. In this proceeding, the Bureau determined, for example, that markups on costs are not reasonable for a service that is an accommodation for persons with disabilities, and that certain labor inefficiencies resulted in labor costs that could not be considered to be reasonable. The Bureau also determined that it was unreasonable for the Interstate TRS Fund to pay for software development for services that would go beyond our mandatory minimum standards, or that would be proprietary in nature. We find that these conclusions were reasonable and supported by the data submitted, and we therefore affirm them. Section 225's broader pronouncements concerning ensuring the broad availability of TRS and the use of improved technology do not negate the more specific requirement that providers may be compensated for their costs of providing TRS, and that those costs must be fair and reasonable. Otherwise, the universe of recoverable costs would be unbounded.

196. Petitioners make a variety of related policy arguments in support of their petitions for reconsideration. Hands On, for example, states that its costs of providing VRS exceed the interim compensation rate.[557] Sorenson asserts that it is not economically feasible to add more VRS interpreters under the interim compensation rate, and that therefore because of high demand, callers are subject to long call waiting times.[558] CSD argues that uncertainty about compensation rates leads to risk about whether costs can be recovered, and that possible downturns in demand could further hurt its ability to

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[551] *See* Sorenson *Petition* at 6 (quoting 47 U.S.C. § 225(b)(1)).

[552] *See id.* at 7.

[553] *Id.*

[554] *See* CSD *Petition* at 3 (citing 47 U.S.C. § 225(d)(3)).

[555] 47 U.S.C. § 225(b)(1).

[556] 47 U.S.C. § 225(d)(2).

[557] *See* Hand On *Petition* at 12.

[558] *See* Sorenson *Petition* at 3.

continue to provide VRS by reducing revenues.[559] Sprint asserts that if the interim compensation rate is abandoned and NECA's proposed compensation rate of $14.023 is adopted, the risks associated with providing VRS will be reduced, service will improve, and an increased use of VRS will result in efficiencies of scale and a decline in VRS costs that will, in turn, ultimately drive the compensation rate lower.[560] All petitioners agree that the adoption of NECA's proposed compensation rate of $14.023 will allow the continuation and growth of high-quality VRS, to the benefit of persons with and without hearing and speech disabilities who use VRS.

197. We do not doubt that, from a provider's perspective, a relatively higher VRS compensation rate, rather than a lower compensation rate, would be more beneficial to the provider's ability (and desire) to offer VRS. But *all* TRS compensation rates are based on the providers' projected costs of providing the service consistent with the mandatory minimum standards and their projected minutes of use, and are intended to ensure, as we have repeatedly noted, that the providers recover their costs of providing the service. In other words, the process of setting "reasonable" compensation rates is, by its very nature, intended to ensure the continuation of the service. Further, most of the forms of TRS currently available are required services. To the extent petitioners are arguing that without a higher compensation rate they cannot pursue further enhancements to the non-mandatory VRS service, we note that the providers are not entitled to unlimited financing from the Interstate TRS Fund to enable them to further develop a service that is not even required, under a statute that requires providers to offer TRS as an accommodation for persons with certain disabilities.

198. NAOBI and RID raise another concern. They assert that the interim VRS compensation rate could lead to cuts in the interpreter workforce, the use by VRS providers of non-certified interpreters, and greater interpreter workload with attendant health and safety concerns.[561] While we share these commenters' desire to ensure that competent interpreters act as VRS CAs, we have not mandated particular interpreter certifications.[562] We trust that any VRS provider that employs CAs who are not able to interpret effectively and accurately will rapidly lose business to VRS providers that employ VRS CAs who can do so, and therefore this issue is self-correcting. Further, we have not set specific standards for the daily operations of TRS centers; at the same time, we note that we raise in the *FNPRM* below issues concerning the interpreters' working conditions and the likelihood of repetitive motion injuries for interpreters should VRS be made a mandatory service. In short, the Bureau's adjustment of labor costs was based on its calculations of reasonable efficiency, including reasonable occupancy and utilization rates, and we have no basis on which to disturb that decision.

199. Finally, TDI, Hamilton, and NorCal assert that the interim compensation rate has led to a decline in the quality and availability of VRS.[563] We note, however, that since the *Bureau TRS Order* was adopted, a new provider has commenced offering VRS, and it appears that hours of operation were reduced only slightly by some providers.[564] Further, we are in possession of no data that reflects a

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[559] *See* CSD *Petition* at 13-14.

[560] *See* Sprint *Petition* at 17.

[561] *See* NAOBI Comments at 1; RID Comments at 1-2.

[562] *Cf.* 47 C.F.R. 64.601(14) (defining "Qualified interpreter").

[563] *See* TDI Comments at 10-11; Hamilton Comments at 2; NorCal Aug. 1, 2003, Comments at 1.

[564] Hamilton commenced its VRS service on October 20, 2003. Hamilton Relay, Inc. Press Release, dated Oct. 20, 2003. We understand that Sprint slightly reduced their operating hours for VRS after the *Bureau TRS Order*, but that Sorenson and CAC have now expanded their hours. *See generally* www.cacvrs.org and www.sorensonvrs.com. At the same time, we note that, as the TRS fund administrator has reported, the minutes of use for VRS increased from 211,529 in June 2003; to 290,724 in September 2003; to 381,783 in December 2003; to 534,536 in February 2004; and to 709,718 in March 2004. This recent growth in the minutes of use of VRS is reflected in the Consumer & Governmental Affairs Bureau *Order* released February 24, 2004, which, as a result of the significant growth in

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meaningful decline in the quality of VRS. More broadly, as we stated above, our mandatory minimum standards are intended to define what constitutes, at a given point in time, functionally equivalent TRS service. Further, the same standards to do not apply to each form of TRS. The Commission specifically waived certain requirements for VRS providers, including speed of answer, and also has not required non-mandatory services (like VRS and IP Relay) to be offered 24 hours per day, 7 days a week.[565] These waivers reflect the fact that in authorizing the provision of a new non-mandatory service as a form of TRS, it may not be appropriate to require providers to meet all of the mandatory minimum standards.[566] Therefore, for purposes of determining the "reasonable" costs that may be recovered for providing such a service, the costs must relate to the provision of the service in compliance with the applicable non-waived mandatory minimum standards. In other words, although the principle of functional equivalency necessarily applies to the provision of all forms of TRS, the parameters of functional equivalency are specific to each form of TRS. And as we have noted, although providers are entitled to recover their costs for providing functionally equivalent service, they are not entitled to recover their costs of providing what they may think is the best possible service they can offer without regard to cost.

5. Conclusion

200. For the reasons set forth above, we affirm, except as otherwise specifically provided herein, the cost recovery methodology for VRS established in the *Bureau TRS Order*. We adjust the VRS compensation rate to a per-minute compensation rate of $8.854. Because this adjustment is based on our review of the supplemental data submitted by the providers after we issued the *Bureau TRS Order*, the $8.854 compensation rate will be effective commencing September 1, 2003.[567]

B. THE OCTOBER 25, 2002, FIFTH REPORT AND ORDER ON "COIN SENT-PAID" TRS CALLS FROM PAYPHONES (CC DOCKET 90-571)

1. Background

201. On October 25, 2002, we issued the *Coin Sent-Paid Fifth Report & Order*,[568] which adopted measures to ensure the availability of payphone services for TRS users that are functionally equivalent to traditional payphone services provided to non-TRS users.[569] We noted that we had construed our requirement that TRS providers offer "any type of call"[570] to include coin sent-paid calls, which are calls made by depositing coins in a coin-operated public payphone.[571] At the same time, we

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the minutes of use of VRS and IP Relay this fund year, increased the Interstate TRS Fund size from approximately $115 million to $170 million. *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, CC Docket No. 98-67, DA 04-465 (Feb. 24, 2004).

[565] *See VRS Waiver Order* at ¶¶ 15-16; *Improved TRS Order & FNPRM* at ¶ 42; *see also* 47 C.F.R. § 64.604(b)(4).

[566] The Bureau granted waivers both to assist the growth of VRS as a new technology and service, and because some of the TRS mandatory minimum standards, developed for a text- and telephone-based service, simply do not apply to a video- and Internet-based service.

[567] We note that the fund administrator's proposed compensation rates for the July, 2004, through June, 2005, fund year were filed on May 3, 2004, and that the Commission is reviewing them and will adopt new compensation rates that will be effective July 1, 2004.

[568] *Telecommunication Relay Services and the Americans with Disabilities Act of 1990*, Fifth Report and Order, CC Docket No. 90-571, FCC 02-269, 17 FCC Rcd 21233 (Oct. 25, 2002) (*Coin Sent-Paid Fifth Report & Order*).

[569] *See id.* at ¶ 17; *see also id.* at ¶¶ 23-27.

[570] *See* 47 C.F.R. § 64.604(a)(3).

[571] *See TRS I* at ¶ 18 n.18.

noted long-standing concerns about the technical difficulties associated with providing coin sent-paid calls through TRS facilities.[572] We therefore addressed whether a solution for processing coin sent-paid calls had been developed, as well as other means by which individuals with hearing and speech disabilities could make TRS calls from payphones without using coins but instead using calling cards, prepaid cards, and collect or third-party billing.

202. We concluded that a technological solution to processing coin sent-paid calls was not available, and that the coin sent-paid functionality was not necessary to achieve functional equivalency.[573] We therefore eliminated the requirement that TRS carriers and providers be capable of providing coin sent-paid TRS service from payphones.[574] With regard to local (non-toll) calls, we mandated that carriers provide free TRS local calls from payphones.[575] With regard to toll calls, we required carriers to allow the use of calling cards, prepaid cards, and collect or third party billing for TRS calls from payphones.[576] We also declined to codify an element of the "Alternative Plan" that provided that, for TRS toll calls from payphones, common carriers may not charge more than the lower of the coin sent-paid rate or the rate for the calling card, collect, or third-party billing.[577] We noted that for the charges to be the lower of the coin sent-paid rate or the rate of the caller's preferred billing mechanism, a comparison must be made, and concluded that "a requirement to compare the coin sent-paid rate and a calling card rate would be unworkable."[578] We also concluded that a "requirement that a TRS provider assure the user [the] lower rate for long distance calls is not required for functional equivalency."[579] Finally, we encouraged specific outreach and education programs to inform TRS users of their options to coins when placing toll calls

[572] *See Coin Sent-Paid Fifth Report & Order* at ¶¶ 2, 4; *see generally id.* at ¶¶ 1-15 for the background and history of our various coin sent-paid orders. As we have noted, handling TRS calls made with coins from payphones is technically difficult because a relay call is really two separate calls – one from the customer to the relay facilities, and a second call from the relay facilities to the called party. TRS facilities are not equipped to handle the necessary call processing functions (*e.g.*, assessing the proper charge and handling coin collection and return functions) for the second leg of the call. *Id.* at ¶ 22 n.69.

[573] *See id.* at ¶¶ 2, 17.

[574] *E.g., id.* at ¶ 17.

[575] *See id.* at ¶¶ 18-21. Even before adoption of the *Coin Sent-Paid Fifth Report & Order*, the first leg of a toll free call to a TRS facility was free of charge to the caller. *See also* 47 CFR § 64.1330 (b) (requiring that TRS calls for persons with hearing and speech disabilities be available from all payphones at no charge to the caller). In the *Coin Sent-Paid Fifth Report & Order* we noted that each state telecommunications relay facility may be reached toll free by using the state's 800 dialing number or the TRS 711 dialing code. *Coin Sent-Paid Fifth Report & Order* at ¶ 18 n.54. We further noted that as of October 1, 2001, all telecommunications carriers were required to implement the 711 code for access to TRS calls; that code enables TRS users to reach the local TRS facility from wherever they are placing the call by dialing 711. *Id.* (citing *Use of N11 Codes and other Abbreviated Dialing Arrangements,* Second Report and Order, CC Docket No. 92-105, FCC 00-257, 15 FCC Rcd 15188 (Aug. 9, 2000) (*N11 Second Report and Order*).

[576] *Id.* at ¶ 22.

[577] *Id.* at ¶ 23. The Alternative Plan was an interim plan to enable individuals to make TRS calls from payphones using payment methods other than coins while the Commission, industry, and consumers studied the technology of payphones to determine a feasible coin sent-paid solution. The Alternative Plan required carriers to: (1) allow TRS users to make local TRS payphone calls free of charge; (2) enable TRS users to make toll calls by using calling or prepaid (debit) cards; and (3) develop programs to educate TRS users about alternative payment methods and to make calling or prepaid cards available to TRS users. *See Coin Sent-Paid Fifth Report and Order* at ¶¶ 6-7. Under this plan, carriers were required to offer *either* calling cards *or* prepaid cards at rates not to exceed those that would apply to a similar non-TRS call made using coin sent-paid service. *See Telecommunications Relay Services and the Americans with Disabilities Act of 1990,* Memorandum Opinion and Order, CC Docket No. 90-571, DA 95-1874, 10 FCC Rcd 10927 at ¶ 18 (Aug. 25, 1995).

[578] *Coin Sent-Paid Fifth Report & Order* at ¶¶ 23-24 & n.80.

[579] *Id.* at ¶ 24.

from payphones.[580]

203. On November 25, 2002, four consumer groups filed a joint petition for reconsideration of the *Coin Sent-Paid Fifth Report and Order*,[581] raising two central issues. First, the Joint CSP Petitioners assert that the Commission eliminated the requirement of "cost parity" for toll calls via payphones by TRS users and such calls by non-TRS users, and request that the Commission restore the requirements that carriers charge "the lower of the coin sent-paid rate or the rate for calling card and/or prepaid card payment methods for TRS payphone toll calls."[582] Joint CSP Petitioners maintain that the requirement of functional equivalency "requires TRS providers to allow consumers to make and receive TRS calls with the same benefits that are available to non-TRS users, including ... choice of payment option."[583] They also assert that if "alternative payment mechanisms result in higher rates for TRS users, the ... mandate of functional equivalency will not be met."[584] Further, Joint CSP Petitioners assert that implementation issues should not preclude the requirement of cost parity.[585]

204. Second, the Joint CSP Petitioners assert that the Commission should have implemented a national outreach program under the purview of an entity such as the TRS Fund Administrator, rather than leave outreach to the voluntary efforts of the carriers.[586] The Joint CSP Petitioners note that some of the voluntary efforts noted by the Commission were required by earlier Commission orders, and assert that the outreach efforts were nevertheless problematic.[587] The Joint CSP Petitioners assert that by now making outreach obligations voluntary, the outreach will not be effective and, as a result, the Commission is essentially abdicating its responsibilities and legal obligations to provide TRS users with a functionally equivalent service.[588]

205. In response to the Joint CSP Petition, only one comment was filed.[589] The CSP Industry Team opposes Joint CSP Petitioners' assertion that additional regulation is needed to ensure functionally equivalent rates for toll TRS calls made from payphones.[590] The CSP Industry Team asserts that there is no evidence that cost parity is a real problem.[591] According to the CSP Industry Team, "robust competition in the market for calling cards and prepaid cards provides a number of options available for TRS users to make the functional equivalent of coin sent-paid payphone calls, at rates that are usually

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[580] *See id.* at ¶¶ 2, 28-39.

[581] The Joint CSP Petition was filed by TDI, The Consumer Action Network, The National Association of the Deaf, and Self-Help for Hard of Hearing People (Joint CSP Petitioners or Joint CSP Petition).

[582] Joint CSP Petition at 7; *see also id.* at ii (TRS consumers should not have to "pay more for a toll TRS payphone call under a calling card or prepaid card call payment method than a non-TRS user would have to pay under a coin sent-paid payment method"); *Coin Sent-Paid Fifth Report & Order* at ¶¶ 2, 7-11.

[583] Joint CSP Petition at 8.

[584] *Id.* at 9.

[585] *Id.* at 9-10.

[586] *Id.* at 11-21.

[587] *Id.* at 18.

[588] *Id.* at 11.

[589] Comments of the CSP Industry Team filed April 30, 2003. Members of the CSP Industry Team participating in this filing are: AT&T, Sprint, MCI (WorldCom), BellSouth Telecommunications, Inc., Qwest, SBC, Verizon, and Hamilton Telephone ("CSP Industry Team").

[590] CSP Industry Team Comments at 3-4.

[591] *Id.* at 3.

lower than coin sent-paid rates, without the necessity of Commission regulation."[592] The CSP Industry Team further asserts that functional equivalency does not require the Commission to ensure that all common carriers charge TRS users making toll calls rates that are lower than the coin sent-paid toll rate.[593]

206. The CSP Industry Team also asserts that the "Commission should not impose mandatory outreach obligations or national outreach efforts designed solely to address payphone calls."[594] The CSP Industry Team notes that the issue of outreach for TRS generally was raised in the March 2000 *Improved TRS Order & NPRM*,[595] and asserts that outreach regarding TRS calls from payphones should be included in a national program addressing all TRS programs. The CSP Industry Team concludes that "[u]ntil the Commission determines whether to create a comprehensive, national outreach program designed for all TRS programs, and what the proper scope of that outreach program will be, it would be inappropriate for it to adopt a national program, or mandatory outreach requirements, designed to deal solely with payphones and coin sent-paid TRS issues."[596]

2. Discussion

207. We deny the Joint CSP Petitioners' petition for reconsideration of the *Coin Sent-Paid Fifth Report & Order*. First, we decline to impose additional regulation on TRS calls made from payphones, including the notion of "cost parity." The Joint CSP Petitioners essentially argue that unless the Commission mandates that TRS consumers using payphones pay rates no higher than a non-TRS user would pay using coins, we have violated the functional equivalency mandate of section 225. We disagree. The principle of functional equivalency does not require such rigid equality, particularly where it is not technologically feasible to reach such a result. As we noted in the *Coin Sent-Paid Fifth Report and Order*, to determine if a TRS consumer using, *e.g.*, a calling card, is receiving a long distance rate at least as low as the coin sent-paid rate, a comparison has to be made between the coin sent-paid rate for the particular payphone (since such rates vary by phone) and the rate for the calling card.[597] We further noted that the record in this proceeding does not show that it is feasible to make this comparison.[598] No persuasive arguments have been presented to cause us to alter this conclusion. At most, the Joint CSP Petitioners suggest that *it is possible* that TRS users may on occasion pay higher rates than non-TRS users would pay using coins, and that it is *possible* that carriers can implement a method for ensuring that rates arising from other payment methods be the same or lower than coin rates from payphones.[599] Such speculation does not provide a basis upon which we can alter the conclusions set forth in the *Coin Sent-Paid Fifth Report and Order*, which are amply supported by the record.

208. We reiterate that toll rates for the payphone industry are not regulated.[600] We also

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[592] *Id.*

[593] *Id.* at 4.

[594] *Id.*

[595] Citing *Improved TRS Order & NPRM* at ¶ 134.

[596] CSP Industry Team Comments at 3. We note that these comments were filed before the Commission released the *Second Improved TRS Order & NPRM*, which, as we note below, declined to make a determination on various outreach issues and sought further comment on outreach issues. *See Second Improved TRS Order & NPRM* at ¶¶ 77-80, 128-133.

[597] *Coin Sent-Paid Fifth Report and Order* at ¶ 24.

[598] *Id.* at ¶ 24 & n.80.

[599] Joint CSP Petition at 10.

[600] *Coin Sent-Paid Fifth Report and Order* at ¶ 24.

reiterate that calling cards, prepaid cards, and collect and third party billing are payment options for placing TRS toll calls from payphones, and that the calling card and prepaid phone card markets are very competitive.[601] We also again note that the CSP Industry Team advised in their comments in the *Coin Sent-Paid Fifth Report and Order* proceeding that their common carrier members of the Industry Team complied with the Alternative Plan by keeping their prepaid and calling card rates below the coin rate for all of their customers.[602] We again "encourage all long distance carriers to continue this practice or we may intervene to require it for TRS calls."[603] Finally, with regard to outreach, in the *Second Improved TRS Order & NPRM* we declined to mandate a nationwide uniform outreach campaign,[604] and, for the reasons discussed above, we have again declined to do so in this *Report and Order*.

C. THE JUNE 17, 2003, SECOND IMPROVED TRS REPORT AND ORDER (CC DOCKET 98-67)

1. Background

209. In the *Second Improved TRS Order & NPRM*, the Commission concluded that, consistent with the functional equivalency mandate, emergency calls made through TRS must be routed to an "appropriate" PSAP, not necessarily the "nearest" PSAP.[605] In doing so, we "reject[ed] proximity as the primary criterion for determining to which PSAP an emergency TRS call should be routed."[606] We defined "*appropriate*" PSAP as the designated PSAP to which a direct call from the particular number would be delivered.[607]

210. We also addressed the need for TRS providers to have a reliable and accurate PSAP database in order to ensure that an emergency TRS call will be routed to the appropriate PSAP.[608] We noted that, according to commenters, PSAP databases are available from a variety of resources, suggesting that TRS facilities may expeditiously implement a system to route emergency calls to the appropriate PSAP.[609] Therefore, we required that all TRS facilities be able to pass emergency callers to the appropriate PSAP within twelve months of publication of the *Second Improved TRS Order* in the *Federal Register*.[610] Under the functional equivalency mandate, we required that TRS facilities "ensure that any database used to route a TRS emergency call to a PSAP be updated on the same schedule that

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[601] *Id.* at ¶ 25.

[602] *See id.* at ¶ 26.

[603] *Id.*

[604] *See Second Improved TRS Order & NPRM* at ¶ 79.

[605] *Id.* at ¶ 40.

[606] *Id.* As we also noted, the *Improved TRS Order & FNPRM* required that such calls be routed to the "appropriate" PSAP, but our rules codified the requirement as being the "nearest" PSAP. *Id.* at ¶ 38; *see also* 47 C.F.R. § 64.604(a)(4).

[607] *Id.* at ¶ 41; *see* 47 C.F.R. § 64.3000(c) (defining the Public Safety Answering Point (PSAP) as a facility that has been designated to receive 911 calls and route them to emergency services personnel). *See also* 47 C.F.R. § 20.3 (defining "designated PSAP" to be the PSAP designated by the local or state entity that has the authority and responsibility to designate the PSAP to receive wireless 911 calls.").

[608] *Second Improved TRS Order & NPRM* at ¶ 42.

[609] *Id.*

[610] *Id.* (making requirement effective twelve months from Federal Register publication date of August 25, 2003 (68 FR 50973). We noted that many TRS facilities have been relaying TTY calls to the appropriate PSAP since the publication of the *Improved TRS Order*. *Id.* at n.161.

PSAP routing databases are updated for 911 calls placed by voice telephone users."[611]

211. On September 24, 2003, Verizon and AT&T filed petitions for reconsideration of the *Second Improved TRS Order & NPRM* with respect to issues concerning the routing of emergency calls to the "appropriate" PSAP.[612] First, Verizon asserts that the "appropriate" PSAP should not be defined to be the *same* PSAP that would have been reached if the caller had dialed 911, but rather to be "*either* a PSAP that the caller would have reached if he had dialed 911 directly, or a PSAP that is capable of enabling the dispatch of emergency services to the caller in an expeditious manner."[613] Verizon notes that directly dialing 911 via a TTY or other device is the preferred method of reaching emergency services, and that dialing 711 to reach a TRS CA "should be understood as the functional equivalent of a voice call to '0' – it should provide a 'backup' for callers who, for whatever reason, did not dial 911 directly."[614]

212. Second, Verizon seeks reconsideration of the requirement that the TRS emergency PSAP database be updated on the same schedule as 911 "routing databases."[615] Verizon explains that because of the way in which 911 calls are routed, it would take several years and be very costly to create a system that would ensure that the TRS provider could direct emergency calls to the same PSAP that would have been reached had the TRS user dialed 911.[616] Verizon adds that, in any event, this is unnecessary because if a TTY user calls 911 the call will be routed automatically to the same PSAP as a call by a voice telephone user.[617] Verizon therefore maintains that TTY users already have functionally equivalent 911 service because PSAPs must be able to receive 911 calls directly from a TTY.[618]

213. In its Petition, AT&T also seeks reconsideration of the requirement that databases used to route TRS emergency calls to a PSAP be updated on the same schedule that PSAP routing databases are updated for 911 calls placed by voice telephone users, asserting that such a requirement will impose significant compliance burdens on AT&T and other TRS providers.[619] AT&T explains that this obligation would require that its third party vendor establish new arrangements with each state public agency that maintains and updates the list of PSAPs in its jurisdiction to assure that the list of PSAPs used for routing TRS traffic is concurrently modified to reflect changes for routing traditional voice callers' emergency traffic.[620] AT&T further asserts that if this requirement is kept in place, the Commission should exercise its authority over the LECs that serve wireline 911 callers and require them, as they update their own PSAP databases, to concurrently make the same information available to TRS providers.[621] AT&T also proposes the establishment of a single database available for all TRS providers

[611] *Id* at ¶ 42.

[612] *See* Verizon *Petition for Reconsideration of Verizon*, filed September 24, 2003 (*Verizon Petition*); AT&T *Petition for Limited Reconsideration and for Waiver*, filed September 24, 2003 (*AT&T Petition*). *See generally Second Improved TRS Order & NPRM* at ¶ 37-42. In its Petition, AT&T also requested that the Commission waive the deadline for the implementation of the three-way calling requirement in the *Second Improved TRS Order & FNPRM*. *AT&T Petition* at 10. That issue was addressed in an Order released by the Consumer & Governmental Affairs Bureau on February 24, 2004 (DA 04-465).

[613] *Verizon Petition* at 1-2.

[614] *Id.* at 2-3.

[615] *Id.* at 1.

[616] *Id.* at 5-7.

[617] *Id.* at 2.

[618] *Id.* at 2-3.

[619] *AT&T Petition* at 4.

[620] *Id.* at 4-5.

[621] *Id.* at 5.

to use for routing an emergency TRS call to a PSAP.[622] AT&T believes that such a system would greatly simplify those carriers' task by eliminating unnecessary duplication of effort and lack of uniformity in formats and procedures for furnishing such information.[623]

214. With respect to the first issue, most commenters support Verizon's proposed modification of the definition of "appropriate PSAP."[624] Commenters note the technical difficulties involved in routing to "the" appropriate PSAP as well as the onerous financial burden that would be required to achieve that ability.[625] Commenters also note that upgrading the TRS system to meet this requirement is essentially duplicating the 911 system because TTY callers already have the functional equivalent service of a 911 call because PSAPs are required to be able receive TTY calls directly.[626] TDI, however, opposes any modification to the definition of "appropriate PSAP," and urges the Commission to retain the requirement that TRS users that dial 711 in emergencies be able to reach the same PSAP that would have received the call if the caller had direct-dialed 911.[627]

215. With respect to the second issue, Verizon opposes AT&T's proposal that the Commission require LECs to make the same information available to TRS providers whenever the LECs update their PSAP databases.[628] Verizon contends that AT&T's request for access to PSAP databases misunderstands the complicated nature of the 911 routing system.[629] Verizon states that the 911 routing information is not in a "database" that can be read or used by a TRS provider or national database manager; instead, it is in a format designed to interact with the 911 routers.[630] Verizon also opposes AT&T's suggestion that the Commission mandate the development and deployment of a single database jointly by all TRS providers.[631] Verizon argues that requiring the creation of one single, federally mandated nationwide system would only impose a burdensome and extremely expensive requirement that could distract from and compromise the already effective methods for handling emergency calls.[632] Verizon also suggests that a better course of action than a national database is to educate TRS users to dial 911 directly in the event of an emergency.[633] Many commenters agree with Verizon and note the difficulties and burden of

[622] *Id.* at 7.

[623] *Id.*

[624] *See, e.g.*, The Frontier and Citizens Telephone Companies (Frontier) Reply Comments at 1; Hamilton Comments at 3; MCI (WorldCom) Comments at 3-4.

[625] Frontier Reply Comments at 2; SBC Reply Comments at 3-4; Sprint Comments at 2-3.

[626] Frontier Reply Comments at 1-2; New York State Telecommunications Association, Inc. (NYSTA) Reply Comments at 2-3.

[627] TDI Reply Comments at 3 (citing *Second Report and Order* at ¶ 41).

[628] Verizon Comments at 1.

[629] *Id.* at 2.

[630] Verizon Comments at 2-3. In Verizon's territory, the 911 selective routers generally do not interact with other selective routers; thus information about PSAPs served by one selective router generally is not available to any other selective routers.

[631] Verizon Reply Comments at 2.

[632] *Id.* at 3-4.

[633] *Id.* at 3-4. Hamilton and Ultratec support Verizon's suggestion that TRS users be educated about dialing 911 directly. They refer to this as an outreach campaign. Hamilton Recon Comments at 4; Ultratec Recon Comments at 7. To the extent certain PSAPs are not complying with their obligation to handle TTY calls, SBC suggests the Commission take action to remedy this. SBC Comments at 3. Several commenters emphasize that an emergency call made via TRS facilities and with the assistance of a third-party relay operator (the CA) can never be as efficient as dialing 911 directly. *See, e.g.*, NYSTA Reply Comments at 4; *see also* Frontier Reply Comments at 2 (if the call is terminated prematurely, the TRS operator will certainly not have location information and may not have a

(continued....)

complying with the requirement of updating databases used to route a TRS emergency call to a PSAP on the same schedule that PSAP routing databases are updated for 911 calls placed by voice telephone users.[634]

2. Discussion

216. *"Appropriate PSAP."* We conclude that the requirement we established in the *Second Improved TRS Order & NPRM* – that the "appropriate" PSAP to which an emergency TRS call should be routed is the *same* PSAP to which a direct call from the particular number would be delivered – creates an unnecessary and undue burden on providers, and therefore we reject it. We now adopt the definition of "appropriate" PSAP as "*either* a PSAP that the caller would have reached if he had dialed 911 directly, or a PSAP that is capable of enabling the dispatch of emergency services to the caller in an expeditious manner," and we amend rule 64.604(a)(4) accordingly. Our ultimate guidepost is whether a TRS user calling a TRS facility with an emergency call will have his or her call directed to a PSAP that can respond to the emergency. As Verizon notes, even if the TRS provider routes the emergency call to a PSAP that is not the same one that the caller would have reached if he had dialed 911, the PSAP that receives the emergency call should be able to use the customer's telephone number to determine which PSAP the caller would have reached if he had dialed 911, and transfer the call to that PSAP.[635] We also agree that to require routing to the *same* PSAP would be nearly impossible unless the entire TRS system taps into the 911 routing system, including the E911 system. The overhaul of such a system that essentially duplicates the 911 system would create substantial expense.

217. *Updating PSAP database.* Because we have revised the definition of the "appropriate" PSAP to remove the requirement that emergency TRS calls be routed to the *same* PSAP that would have received the call had the caller dialed 911, we believe that TRS providers should be able to satisfy the requirement in the *Second Improved TRS Order & NPRM* that all TRS facilities be able to pass emergency callers to the appropriate PSAP prior to August 24, 2004 (the effective date of the rule adopted in the *Second Improved TRS Order & NPRM*[636]). We also believe that this change makes it unnecessary to require TRS facilities to ensure that any database used to route a TRS emergency call to a PSAP be updated on the same schedule that PSAP routing databases are updated for 911 calls placed by voice users, or to require LECs to provide PSAP updates to TRS facilities as they update their own facilities with PSAP information. At the same time, we note that TRS providers have been maintaining their PSAP databases since the Commission amended the Handling of Emergency Calls rule in the *Improved TRS Order & FNPRM*.[637] We continue to require providers to maintain and update their databases to the

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callback number. These issues are solved if the caller dials 911 where there is an E-911 system); Ultratec Recon Reply at 7 (direct calling ensures that a caller's most appropriate PSAP will always receive the caller's automatic number identification (ANI) and automatic location identification (ALI) via 911 system capabilities.) *But see* TDI Coalition Reply Comments at 6. TDI contends that there always will be TRS users who dial 711 in the case of emergency, because that is the number they routinely dial for service, just as dial tone users routinely dial 411 for directory assistance. TDI also notes that not all users of relay services call relay by TTY. Some users call via Voice Carry Over (VCO), Hearing Carry Over (HCO) or Speech-to-Speech (STS), and these services are not directly compatible with TTYs. Therefore, callers utilizing these services would be unable to call a PSAP directly, even if the PSAP is TTY capable. TDI Coalition Recon Reply at 5-6.

[634] *AT&T Petition* at 4; Sprint Comments at 4. Sprint reports that, although Sprint's PSAP database vendor does not receive real-time updates, there have not been any adverse effects. Sprint supports a further study of AT&T's proposal.

[635] *See Verizon Petition* at 3-4.

[636] *I.e.*, 12 months after the *Second Improved TRS Order & NPRM* was published in the Federal Register. *See Second Improved TRS Order & NPRM* at ¶ 42.

[637] *Improved TRS Order & FNPRM* at ¶¶ 99-102.

extent possible, and we encourage TRS providers to continue to work with state public agencies to establish a process whereby PSAP data is provided to TRS providers on a timelier basis.

218. We also deny AT&T's request for a single national PSAP database that is available to all TRS providers. We agree with Verizon that, because no national database exists for routing 911 calls, a similar database for TRS emergency calls is not required to satisfy the functional equivalent mandate.

219. Finally, we agree with commenters that placing emergency calls through TRS facilities might never be as effective or reliable as placing direct 911 TTY calls; for this reason, we have already stated that the recommended method for persons with hearing disabilities to reach assistance in an emergency is by dialing 911.[638] In this regard, we agree with Verizon and other commenters that more education and outreach is needed to educate TTY users to dial 911 directly, instead of dialing a TRS facility, in an emergency.[639] We therefore strongly encourage TRS providers and common carriers to include educational materials addressing this matter with their advertisements and mailings to all customers, and in their other outreach efforts. At the same time, however, we stress that these outreach activities do not relieve TRS providers of their obligation to handle emergency calls under our rules. Our rules require that if an emergency call is made via TRS, TRS providers must ensure that the call is directed to an appropriate PSAP.[640] Therefore, we reiterate that in the event a TRS user places an emergency call through TRS, by either dialing 711 or a 10-digit TRS number, the CA must immediately handle the emergency call and route it to *an appropriate* PSAP. It is not permissible, as some commenters suggest, for TRS providers to instruct TRS users to hang up and dial 911 in case of an emergency.

VI. FURTHER NOTICE OF PROPOSED RULEMAKING (CG DOCKET NO. 03-123)

220. In this *FNPRM*, we address a number of outstanding issues with respect to VRS and IP Relay including: (1) the appropriate cost recovery methodology for VRS; (2) what type of mechanism we might adopt to determine which IP Relay and VRS calls are interstate and which are intrastate; (3) whether IP Relay and/or VRS should become mandatory forms of TRS; (4) whether IP Relay and/or VRS should be required to be offered 7 days a week, 24 hours a day; and (5) whether we should adopt a speed of answer requirement for VRS, and if so, what should it be and how should it be phased-in. We also raise the issues of whether there should be separate compensation rates for traditional TRS and IP Relay, and whether the compensation payments for VRS should be established for a two-year period instead of a one-year period. Further, we seek additional comment on issues concerning the certification and oversight of IP Relay and VRS providers. We also seek comment on the TRS Advisory Council, including its composition and the role it plays in advising the TRS Fund Administrator on TRS issues. Finally, we raise issues with regard to recurring problems with the abuse of CAs by callers who seek to either harass the CA, or harass a called party, behind the apparent anonymity of an IP Relay call. As in the past, our goal is to continue to ensure that functionally equivalent TRS services are available to consumers, and to ensure the ongoing integrity of the Interstate TRS Fund.[641]

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[638] *Second Improved TRS Order & NPRM* at ¶ 37.

[639] To the extent that any PSAPs are not accessible by TTY, we note that this requirement is governed by Title II of the ADA, which is overseen by the Department of Justice.

[640] We note, however, that this requirement has been waived for IP Relay and VRS. *See* Appendix E below. We also note above that it is premature to implement guidelines for TRS facilities routing wireless emergency TRS calls.

[641] To the extent we are asking for additional comment on matters raised in previous NPRMs or FNPRMs, we will consider the comments filed in those proceedings along with the comments filed in response to this *FNPRM*.

A. IP RELAY

1. Determining which IP Relay Calls are Interstate and which are Intrastate

221. As we have noted, we believe that Title IV and its legislative history make plain that Congress intended that the states be responsible for the cost recovery for intrastate relay services provided under their jurisdiction. Therefore, although we previously raised the issue of what mechanism will ensure that the Interstate TRS Fund pays only for IP Relay calls that are in fact interstate, we now seek further comment on this issue. We acknowledge the technical difficulties in determining the location of the party to an IP Relay call who is using the Internet to communicate with the CA. As we have noted, the Internet has no equivalent to the PSTN's ANI, which allows the automatic determination of each caller's location in a traditional TRS call. We also acknowledge that, to the extent IP Relay is not a mandatory service under our rules, not every state may wish to enter into a contract with one or more of the current or future IP Relay providers.[642]

222. Because the record does not indicate that a technological mechanism presently exists that can provide for the automatic identification of the location of an IP Relay caller, we must look to other methods by which the Commission might determine which IP Relay calls are intrastate and which calls are interstate. Two alternatives have previously been suggested – use of a fixed allocator (as a proxy for the actual identification of a particular call as intrastate or interstate) or registration.[643]

223. Although commenters generally asserted that the use of an allocator would be unworkable,[644] we seek further comment on this approach and the following considerations. First, we recognize that to the extent IP Relay is and remains a non-mandatory service, we do not have the authority to require all states to offer IP Relay service. As a result, if we were to establish an allocator for apportioning IP Relay calls between the Interstate TRS Fund and the states, the refusal of one or more states to offer IP Relay, or any change in the number of states that offer IP Relay, might render the determination of the proper allocation *among* the states unduly burdensome.[645] Second, we seek comment on how we would determine what the allocator should be in this context. Although it is possible to use traditional TRS and STS as a guide, NECA noted in May 2003 that there has been a significant shift in interstate minutes from traditional TRS to IP Relay, which, because it is not possible to jurisdictionally identify IP Relay calls, has made developing a factor for allocating toll-free calls less accurate.[646] For the same reason, then, using traditional TRS and STS minutes to create a factor for allocating IP Relay calls may not necessarily result in an accurate factor; indeed, we would be using statistics derived from a smaller pool of minutes to determine the appropriate allocation of a larger pool of minutes. Finally, commenters previously asserted that use of an allocator may cause states whose residents rarely use IP Relay to refuse to fund intrastate IP Relay, and would be administratively burdensome.[647] We therefore seek further comment on whether use of an allocator could be a reasonable

[642] We note, however, that we raise below in the *FNPRM* whether IP Relay should be made a mandatory service. Depending on the resolution of that issue, it is conceivable that IP Relay could be made a mandatory service effective at the same time the Interstate TRS Fund will pay for only interstate IP Relay calls.

[643] No method other than use of a fixed allocator or registration was previously suggested by any commenter.

[644] *See* Sprint Comments at 2; MCI (WorldCom) Comments at 6; TDI Comments at 12; Hamilton Reply at 3.

[645] This is in contrast to the allocator used for toll-free calls, because that allocator merely apportions costs between each state and the Interstate TRS Fund, not among the several states.

[646] NECA May 1, 2003 filing at 7. As we have noted, IP Relay minutes now substantially exceed traditional TRS minutes. *See id.* at Ex. 2.

[647] *See e.g.*, Sprint Comments at 2; MCI (WorldCom) Comments at 6. We raise below, however, the related issue of whether IP Relay should become a mandatory form of TRS.

approach to determining which IP Relay calls are (or could be considered) intrastate and which are (or could be considered) interstate, and if so, how such a scheme should be designed and implemented.

224. The other alternative proposed in the *IP Relay Declaratory Ruling & FNPRM* is the use of mandatory customer profiles to determine caller location, *i.e.*, registration of IP Relay customers.[648] We recognize that some commenters have previously expressed opposition to registration.[649] We now seek further comment on whether registration should be used to determine whether an IP Relay call is interstate or intrastate, and on the particular concerns we note below.

225. First, with regard to the possible reluctance of TRS users to submit personal information via the Internet, we note that IP Relay providers currently use voluntary profiles to assist regular callers and expedite their calls.[650] Further, in order for consumers to have Internet access at all, they are often required to give personal information, at least to the extent of a credit card number, or address and telephone number, to an ISP. Moreover, any fears that customers might have of giving personal information via the Internet in this context should be considerably alleviated by our strict TRS confidentiality rules,[651] and by the fact that we are encouraging all IP Relay providers to offer to their customers encryption of calls. In view of these factors, we seek further comment on whether TRS consumers would view registration as an excessive burden in this context.[652]

226. More specifically, we seek comment on whether we should adopt a registration scheme as follows: To be eligible for compensation from the Interstate TRS Fund, IP Relay providers would be required to ensure that users of their IP Relay service register and have on file with the provider a profile that indicates the geographic location from which they are placing the IP Relay call. Calls could then be handled as follows, depending on the particular circumstances of the call: (1) if the caller is already registered with the provider, and is calling from the location indicated on the registration, the caller would need only to confirm that fact when asked by the CA during the call set up; (2) if the caller is already registered with the particular IP Relay provider, but is calling from a location different from that indicated on the registration, the caller would need to provide either the telephone number of the line through which they are contacting the IP Relay provider or, if the customer's internet connection is not via telephone line (*e.g.*, through the Internet via cable modem or other non-PSTN connection), the location or address from which he or she is calling; and (3) if the caller is *not* already registered with the IP Relay provider that he or she is using (*e.g.*, a first time user of that provider's service), the caller would be required to register with the IP Relay provider before the call is placed. Consumers would not be precluded from registering with more than one provider, and could even be encouraged to do so.

227. In such a manner, an IP Relay provider would be able to identify the location of a party using IP Relay – either from the caller profile of a registered user, the ANI of the Internet connection number, or directly from the caller, depending on the circumstances – and then be able to determine by

[648] *See IP Relay Declaratory Ruling and FNPRM* at ¶ 43.

[649] Commenters have asserted, for example, that the use of profiles, or mandatory registration of callers, is unpopular with users of IP Relay, and could discourage the use of IP Relay or lead callers to provide false registration information. *See* TDI Comments at 11; MCI (WorldCom) Comments at 4; Sprint Comments at 2-3; Hamilton Reply Comments at 4.

[650] *See, e.g.*, www.iptrs.com/profile.html (Hamilton Relay's website).

[651] *See* 47 C.F.R. § 64.604(a)(2).

[652] We also acknowledge that a registration system may permit providers to charge for the long-distance portion of an IP Relay call, where currently consumers are not charged for such calls. We do not believe that this is a reason to reject registration as a means of determining which calls are interstate and which are intrastate. Free long-distance calls are not, and were never intended to be, an essential feature of IP Relay, but merely reflected a *quid pro quo* for the carrier-of-choice waiver.

reference to the telephone number of the other party to the call whether the call is intrastate or interstate. The IP Relay provider would then determine which calls are interstate and which calls are intrastate, and would receive reimbursement from the Interstate TRS Fund only for the interstate calls. We note that if such a scheme were adopted, we would also have to provide that IP Relay providers could not request or require other information from IP Relay users beyond that which would be necessary to determine the customer's location as part of the registration process. IP Relay providers could be required to clearly inform customers that any information they provide beyond telephone number or address for the purpose of determining interstate or intrastate jurisdiction is provided on a purely voluntary basis, as is the case currently with caller profiles.[653] We seek comment on this issue as well.

228. We recognize that a registration requirement would affect the current structure of IP Relay. Currently, IP Relay providers operate on a national basis. These providers would likely have to establish a contract relationship with any state in which they desire to offer intrastate service in order to receive compensation for providing intrastate calling within that state.[654] We would hope and expect that states would enter into contracts with one or more IP Relay provider for service to that state, although that concern would at least be partly satisfied if IP Relay were made a mandatory service, as addressed below. We seek comment on this concern and the issue of multi-vendoring in this context. We also recognize the possibility that some IP Relay users might falsify their registration information or, if they are calling from a location other where they are registered, might not so inform the provider, and therefore the call would be incorrectly viewed as intrastate instead of interstate (or vice versa). We note, however, that if IP Relay providers were able to continue their policies of not charging for long-distance calls,[655] there will be little incentive for customers to falsify their registrations. Should IP Relay providers begin charging for long-distance calls, customers who have given false registration information to avoid long distance charges would risk the substantial penalties that can result from such illegal action. We also seek comment on this concern, and whether it might be necessary to also adopt procedures for the verification of registration information.[656]

229. We also seek comment on whether, as an alternative to adopting a mechanism by which IP Relay calls might be identified as either interstate or intrastate for purposes of cost reimbursement under section 225, such calls should be deemed inherently interstate and, if so, under what rationale such a conclusion could be based. We also seek comment on whether this conclusion would be consistent with the TRS scheme as intended by Congress. We further seek comment of what impact such a conclusion would have on the Interstate TRS Fund and, more broadly, on the provision of TRS services generally.

230. Finally, we seek comment on any other approaches to determining which IP Relay calls are interstate and which are intrastate. Since this issue was first raised, IP Relay providers, state TRS programs, IP Relay consumers, and others may have new ideas or concerns regarding the various

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[653] *See Improved TRS Order & FNPRM* at ¶¶ 77-84 (addressing TRS providers' use of customer information).

[654] We note, for example, that in addition to its nationwide IP Relay, AT&T provides IP Relay via the Maryland Relay website. *See* www.relaycall.com/maryland/relay.html (Maryland Relay's IP Relay website).

[655] In the *IP Relay Declaratory Ruling & FNPRM*, we waived the carrier-of-choice mandatory minimum requirement, *see* 47 C.F.R. § 64.604(b)(3), for IP Relay, noting the difficulty in determining whether or not a given IP Relay call was long-distance and the policy of providers to not charge for long distance. *See IP Relay Declaratory Ruling and FNPRM* at ¶ 31. We conditioned that waiver, however, on IP Relay providers continuing to offer free long-distance calls. *Id.* If we adopted a means of determining whether a particular IP Relay call is interstate or intrastate via a method that allows the determination of the customer's location, and therefore providers were able to determine whether a particular call is long distance, the carrier-of-choice waiver granted previously to IP Relay providers would likely no longer be necessary.

[656] In this regard, we note that a registration scheme may have the collateral benefit of assisting in the prevention of credit card fraud and other illegal uses of IP Relay.

approaches to the this determination. We also seek comment on, if adopted, when the particular approach should be required to be implemented. We recognize that implementation any new compensation recovery scheme for IP Relay will take time and that, in particular, state TRS programs will need some time to plan for their assumption of the costs of the intrastate service. We emphasize that the alternatives we propose in this *FNPRM* with respect to determining whether an IP Relay call is interstate or intrastate are limited solely to this proceeding for the purpose of attempting to determine which IP Relay calls are interstate and which are intrastate, so that the Interstate TRS Fund compensates only the provision of interstate IP Relay calls.[657]

2. IP Relay as a Mandatory Form of TRS and Offered 24/7

231. Closely related to the issue of how to determine which IP Relay calls are interstate and which are intrastate is whether IP Relay should become a mandatory form of TRS service. We believe that since its inception in April 2002, the provision of IP Relay has sufficiently matured, and is sufficiently widespread, such that making IP Relay a mandatory service may not pose new burdens on IP Relay providers or state TRS programs.[658] We also recognize that if IP Relay is not a mandatory service and states are required to assume the costs of intrastate IP Relay, there would be some risk that some states would elect not to offer the service.

232. We therefore seek comment on whether we should require IP Relay to be a mandatory form of TRS service and, if so, whether the effective date should be the same date as the implementation of a mechanism that determines which calls are interstate and which are intrastate. We also seek comment on any other issues that may be implicated by the decision to require IP Relay as a mandatory TRS service. In particular, we seek comment on whether IP Relay should be required to be offered 7 days a week, 24 hours a day either as a mandatory service or even if not made a mandatory service.[659]

3. Separate Rates for IP Relay and Traditional TRS

233. Currently, the Interstate TRS Fund administrator requests and analyzes separate data for the costs of providing IP Relay and traditional TRS, but these services are compensated at the same per-minute rate.[660] We understand, however, that the cost of providing IP Relay may be less than the cost of

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[657] In this regard, we also emphasize that TRS calls are unique in that they are really two calls being handled simultaneously by the CA – for IP Relay calls, this means that one party (*i.e.*, the person with a hearing disability) is communicating with the CA via text and the Internet, and the other party is communicating with the CA via a PSTN telephone call. The CA is handling both calls at the same time, and relaying what was said by the voice caller by text to the person with the hearing disability, and relaying what was typed as text by the person with the hearing disability by voice to the hearing party. This is the accommodation required by Title IV of the ADA so that persons with hearing (and speech) disabilities have access to the telephone system. Therefore, our consideration of whether and how to determine which IP Relay calls are interstate and which are intrastate in this context in no way predisposes how the Commission may proceed with respect to issues relating to the jurisdictional nature of other IP-Enabled services, which are currently the subject of another proceeding. *See IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, FCC 04-28 (March 10, 2004).

[658] According to NECA's May 2004 TRS Status Report, the total minutes of IP Relay usage in March 2004 was 5,234,048, which is more than double the 2,167,955 minutes of traditional TRS.

[659] *See* 47 C.F.R. § 64. 604(b)(4)(i) ("Relay services that are not mandated by this Commission need not be provided every day, 24 hours a day.").

[660] *IP Relay Declaratory Ruling & FNPRM* at ¶¶ 20-22. Every year the Interstate TRS Fund administrator sends a request for data to all interstate TRS providers, seeking costs and demand data for traditional TRS, IP Relay, STS and VRS. The cost data reported consists of annual actual costs, annualized actual costs, and estimated costs. From this data, the TRS Fund administrator develops the relevant projections for the costs, demand, and fund requirement for these forms of TRS for the next compensation cycle, as well as the proposed compensation rates. Although the (continued....)

providing traditional TRS; if that is true, providers of IP Relay may be overcompensated, and providers of traditional TRS may be under compensated. Because the TRS Fund Administrator already separately analyzes the cost data for these services, there would be no administrative burden to the Fund administrator in determining and proposing separate per-minute compensation rates for each service. Therefore, we seek comment on whether we should require the TRS Fund administrator to determine and propose, and the Commission to adopt, separate compensation rates for IP Relay and traditional TRS. We also seek comment on any other issues that may be relevant to determining whether these compensation rates should remain the same or should be separately determined for each service.

B. VIDEO RELAY SERVICE

1. Cost Recovery Methodology

234. As discussed above in the *Report and Order*, the Commission has not yet adopted a final cost recovery methodology for VRS. In the *Report and Order*, we extended the interim arrangement set forth in the *TRS Cost Recovery MO&O & FNPRM* that permits the compensation of eligible VRS providers using the average per minute compensation methodology used for traditional TRS. Given that only two parties filed comments to the *FNPRM* raising this issue, and that these comments were filed more than two years ago, we believe that the record should be refreshed on this issue.[661] We therefore request additional comment on the appropriate cost recovery methodology for VRS. In so doing, we acknowledge the unique characteristics of VRS, and recognize that since the Commission recognized VRS as a form of TRS in March 2000 providers have now had several years' experience in delivering this service, during which time this service has grown to its present usage of more than 700,000 minutes per month (a more than tripling in just the past year). In this light, we urge commenters to address in detail how the nature of VRS supports the cost recovery methodology they advocate, and how it is consistent with the cost reimbursement scheme set forth in section 225 and the Commission's rules.

235. Specifically, we seek comment on whether we should permanently adopt the current per minute compensation methodology for VRS, or whether that approach may be inappropriate for VRS. Particularly, we seek comment on what safeguards might be necessary to adopt if we permanently adopted the per minute compensation methodology, given that the volume of minutes of VRS calls has been rapidly growing and our concern that, given the likelihood of future volatile demand levels for this service, a compensation methodology that is based on predicted future demand levels may not result in a fair and reasonable compensation rate.

236. We also invite proposals for alternative cost recovery methodologies, which might include a lump sum payment or periodic payments of estimated actual costs with a "true-up" at the end of the fund year. With respect to the latter approach, we note the Commission has adopted such measures to "true up," or adjust, a carrier's per-line Interstate Common Line Support to account for differences between projected and actual cost data.[662] In that context, we expect that such a true up arrangement might minimize incentives for carriers to overstate projected interstate common line revenue

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(...continued from previous page)
Interstate TRS Fund administrator requests and analyzes separate data for IP Relay and traditional TRS, presently the services are compensated at the same rate.

[661] Sprint Comments to *TRS Cost Recovery MO&O & FNPRM*, filed January 29, 2002; MCI Comments to *TRS Cost Recovery MO&O & FNPRM*, filed January 29, 2002.

[662] *See, e.g. Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent LEC and IXCs*, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 & 98-166, 16 FCC Rcd 19613 at ¶¶ 120-178 (Nov. 8, 2001) (*MAG Order*).

requirements, and provide support that reflects their actual costs.[663] We seek comment on whether, and if so, how to apply such true up measures to VRS cost recovery.

237. Further, we seek comment on whether, under whatever cost recovery methodology we might adopt, we should clarify the data collection guidelines – set forth in 47 C.F.R. Parts 32 and 36[664] – currently being used by the TRS fund administrator and the TRS providers, or whether we should adopt additional guidelines or rules, so that the reasonable costs incurred in the provision of VRS, given its unique characteristics, and for which providers are entitled to reimbursement, may be better ascertained for purposes of data submission to the fund administrator, and the calculation of the compensation rate. For example, although we have concluded that VRS is a "functionally equivalent" form of TRS service, it remains a relatively new technology, and some providers may choose to develop and provide advanced features which may go beyond "functional equivalency." We therefore seek comment on what clarifications, or further guidelines or rules, we might adopt to assist both providers in submitting data reflecting the costs of providing the service, and the administrator and the Commission in reviewing such submissions, in identifying permissible engineering costs and determining reasonable levels of such costs for inclusion in the VRS compensation rate. In this way, we seek to give providers greater certainty that they will be compensated for the reasonable costs of providing VRS consistent with our rules.

238. Similarly, we note that, because of its unique characteristics, the labor costs of VRS constitute a significantly greater proportion of the overall costs of providing the service, as compared to the other forms of TRS. Therefore, we seek comment on ways by which we might clarify the guidelines, or adopt additional guidelines or rules, to ensure that providers are fairly compensated for the reasonable labor costs incurred in the provision of VRS, and also that providers are compensated for labor costs that represent an efficient utilization of labor and the provision of functionally equivalent VRS. Further, we seek comment on whether we should clarify the guidelines, or adopt additional guidelines or rules, to identify other cost elements incurred in the provision of VRS, and to determine reasonable levels of such costs, for which VRS providers are entitled to compensation under section 225 and the Commission's rules. In providing such comment, we urge commenters to recommend methods to guide the allocation of costs incurred in the provision of service where necessary and appropriate to the provision of VRS to ensure that providers are compensated for the reasonable costs of providing VRS.

239. We also seek comment on whether we should continue to use, in determining the reasonable VRS compensation rate, the rate of return on capital investment developed by the Commission and applied in a wide range of other telecommunications contexts, or whether a different approach should be adopted in this context to compensate providers for their costs of capital. To the extent commenters suggest an alternative approach, we seek comment on the justification for such an approach and the departure from the present norm. Relatedly, we also seek comment on the appropriate treatment of tax allowances in connection with the determination of the VRS compensation rate.

240. In addition, as noted above, the Commission directed the administrator to fashion a form consistent with Parts 32 and 36 for purposes of obtaining the providers' costs of providing eligible TRS services, so that the compensation rates for the various forms of TRS can then be determined based on these costs. We invite commenters to address the appropriateness of this approach as applied to the development of a permanent cost reimbursement methodology for VRS, and in response to the issues raised above concerning the further clarification of these guidelines, or the adoption of additional guidelines or rules, to identify the costs, and amounts of such costs, that should be used as inputs for a particular methodology in calculating a compensation rate for the providers' reasonable costs of offering

[663] *Id.* at ¶ 166.

[664] *See See Telecommunications Relay Services, and the Americans with Disabilities Act of 1990,* Third Report and Order, CC Docket No. 90-571, 8 FCC Rcd 5300 at ¶ 30 (July 20, 1993) (directing TRS fund administrator to fashion form consistent with Parts 32 and 36).

the service. To the extent that commenters propose that VRS should be treated differently from other TRS services with respect to cost compensation, we seek comment on the justification for such a departure. More broadly, we also seek comment on whether additional cost recovery guidelines or rules developed for VRS should also apply to the other forms of TRS eligible for compensation from the Interstate TRS Fund. In this regard, we remind commenters that although responses to these inquiries should be made in the context of the development of a permanent cost reimbursement methodology for VRS, such recommendations should also consider the universal applicability of proposed clarifications, or additional guidelines or rules, in the development of cost data to be factored into the development of an overall VRS compensation rate.

2. Determining which VRS Calls are Interstate and which are Intrastate

241. As we noted in the March 2000 *Improved TRS Order & FNPRM*, we authorized VRS providers to be compensated from the Interstate TRS Fund on an interim basis for all VRS calls (*i.e.*, whether intrastate or interstate).[665] The driving factor behind that funding decision was the desire to promote the growth of VRS usage and technological development. We stated that compensation of all VRS calls from the Interstate TRS Fund "is a temporary arrangement" and that "[w]hen [VRS] develops to the point where it can be required, as we expect it will, we intend[ed] to revert to the traditional cost recovery mechanism."[666] As we have noted, VRS has flourished; minutes of use have risen from 7,215 minutes per month in January 2002, to 159,469 minutes per month in May 2003, to 381,783 minutes per month in December 2004, to 534,536 minutes per month in February 2004, and, most recently, to 709,718 minutes per month in March 2004.

242. We have raised above with respect to IP Relay the issue of whether and how to determine which calls are interstate and which calls are intrastate, so that the Interstate TRS Fund compensates only for the provision of interstate calls, and have sought comment on various approaches to doing so. We also seek comment on this same issue with respect to the provision of VRS. With VRS, like IP Relay, there is presently no means available to automatically determine the geographic location of the Internet-based leg of the call, and therefore there is no way to determine if a particular call is intrastate or interstate. A registration requirement, discussed above with respect to IP Relay, is one possible solution to that problem. Requiring the party to the call that is using the Internet to register and have a profile on file with the provider indicating the geographic location of that end of the call (or to otherwise inform the provider of his or her location) permits the TRS provider to determine whether the call is interstate or intrastate for cost recovery purposes. We also seek comment, however, on other approaches, including use of an allocator or other means of determining which VRS calls are interstate and therefore compensable from the Interstate TRS Fund. We also seek comment on whether it is appropriate or necessary that the same approach should be used for both IP Relay and VRS. Finally, as we also have with IP Relay above, we seek comment on whether VRS calls should be deemed inherently interstate for purposes of cost reimbursement under section 225 and, if so, under what rationale such a conclusion could be based. We also seek comment on whether this conclusion would be consistent with the TRS scheme as intended by Congress, and on its likely impact on the Interstate TRS Fund and, more broadly, on the provision of TRS services generally.

3. VRS as a Mandatory Form of TRS and Offered 24/7

243. We also seek comment on whether we should require VRS as a mandatory form of TRS, an issue we have also raised with respect to IP Relay, and, if so, what effect such an arrangement might

[665] *Improved TRS Order & FNPRM* at ¶ 22.

[666] *Id.* at ¶ 27.

have on our TRS rules.[667] The rapidly growing minutes of use of VRS demonstrates that consumers increasingly prefer this service over traditional TRS. Further, as the Commission embarks on a broader initiative to stimulate the deployment of broadband services, we are mindful that VRS can improve existing services for persons with disabilities and can be a demand driver for broadband connections.

244. Relatedly, we seek comment on how this issue relates to the adoption of a mechanism to determine whether a particular VRS call is interstate or intrastate. As with IP Relay, we are mindful that if we adopt a mechanism to determine which calls are interstate and which are intrastate, and require the states to compensate providers for the intrastate calls, but the service is not mandatory, some states may elect not to fund intrastate VRS, so that consumers in those states would not have access to intrastate VRS. We therefore seek comment on whether we should require VRS as a mandatory service if, and when, a jurisdictional separation of cost scheme becomes effective for VRS, or whether these two issues need not necessarily be linked.

245. In addition, we seek comment on the potential implications of making VRS mandatory on: state TRS programs; the available labor pool of qualified interpreters; and the interpreters' working conditions, specifically the increased likelihood of repetitive motion injuries for interpreters. We are particularly concerned about whether there are sufficient numbers of interpreters in the labor pool such that if the provision of VRS were made mandatory, providers could hire a sufficient number of interpreters to handle the call volume.[668] In this regard, we also seek comment on whether VRS should be required to be offered 7 days a week, 24 hours a day either as a mandatory service or even if not made a mandatory service,[669] and in view of possible labor shortage issues. Finally, we seek comment on any other issues that may be relevant to adopting and implementing a mechanism to determine which VRS calls are interstate and which are intrastate and the possible mandatory provision of this service.

4. Speed of Answer

246. In the December 31, 2001, *VRS Waiver Order* various TRS mandatory minimum standards were waived for providers of VRS, including the speed of answer requirement.[670] Although, as set forth above, we have extended these waivers and required the filing of annual reports, as part of this *FNPRM* seeking comment on a number of VRS issues we also seek comment on whether a particular speed of answer requirement should be adopted for VRS. We are aware that consumers have expressed some frustration over long wait times in placing VRS calls, a result at least in part due to the rapidly growing use of VRS by consumers. We recognize that long wait times undermine the notion of functional equivalency, mandated by Congress. We therefore seek further comment on what an appropriate speed of answer rule for VRS might be, whether it should be the same as the present rule for traditional TRS calls, when such a rule should become effective, whether there are a sufficient number of interpreters available to ensure that providers could meet a particular speed of answer rule, and how a

[667] We note that on May 27, 2004, the California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH) filed a "Petition for Rulemaking" (Docket No. 98-67) requesting that the Commission make VRS a mandatory form of TRS. Because we are raising this same issue in this *FNPRM*, we hereby invite comment to the CCASDHH petition at the same time that we seek comment to the issues raised in this *FNPRM*.

[668] We note that even in the March 2000 *Improved TRS Order & FNPRM*, which recognized VRS as a form of TRS but did not mandate that it be provided, we noted the "potentially inadequate supply of qualified [VRS] interpreters." *Id.* at ¶ 24. That, of course, was before the service was actually being provided, and now VRS usage has reached more than 700,000 minutes of usage a month.

[669] *See* 47 C.F.R. § 64.604(b)(4)(i) ("Relay services that are not mandated by this Commission need not be provided every day, 24 hours a day.").

[670] *See* 47 C.F.R. § 64.604(b)(2) (requiring that 85 percent of all calls must be answered within 10 seconds). This rule is also referred to as the 85/10 rule.

particular rule might affect the cost of providing VRS. More generally, we seek comment on any other matters relating to the intent of the speed of answer rule in the context of VRS.

5. Data Reporting Period

247. Currently, our rules require that the Interstate TRS Fund administrator file with the Commission on May 1 of each year its proposed compensation rates for the various forms of TRS, which rates are to be effective for a one-year period beginning the following July 1.[671] With respect to VRS, the annual per-minute compensation rate has varied sharply from year to year, beginning at $5.143 in July 2000, jumping to $17.044 in July 2002, and then $7.751 in 2003. We understand that this lack of consistency may make it difficult for VRS providers to plan and budget for the provision of this service, particularly with regard to labor costs and staffing. Moreover, as a general matter, the operating expenses for VRS are more complex than with the other forms of TRS, and overall the costs are higher. We therefore seek comment on whether the VRS compensation rate should be set for a two-year period, rather than a one-year period. We seek comment on whether such an arrangement would enable VRS providers to offer this service more effectively and efficiently over time, which might result in a downward pressure on the compensation rate. We also invite related proposals that might result in the more efficient provision of VRS.

6. Other VRS issues

248. Currently, our rules require that CAs, including VRS CAs, remain on the line with the caller for at least 10 minutes.[672] The purpose of this rule is to minimize any disruption to a TRS call.[673] We note, however, that with VRS calls in some instances the caller using ASL and the VRS CA may not be able to understand each other because, *e.g.*, each uses a different style of sign language. In these circumstances, it may be that the VRS call can be more efficiently and effectively handled by a VRS CA other than the one who answered or initially handled the call, and therefore that the 10 minute rule should not apply in this context. We seek comment on whether we should adopt a different standard for the in-call replacement of CAs that applies to VRS calls and, if so, what that standard should be.[674]

249. We also seek comment on whether VRS CAs should be permitted to ask questions to the VRS user during call set-up so that the VRS CA can gain an understanding of the nature of the call before the CA begins relaying the call. As the Commission has explained, because of the limited, transparent role of a CA the completion of the initial call to the TRS facility, and the connection with a CA, is equivalent to receiving a dial tone.[675] For this reason, and because the role of the CA is to relay the call back and forth between the parties as a transparent entity, CAs generally may not ask questions to the initiating party about the call. VRS, however, presents different challenges for CAs who have to deal with the complexities of sign language, including the fact that one sign can mean different things depending on the context. We therefore seek comment on whether our rules should be amended to expressly permit VRS CAs to ask the caller questions about the nature of the call during call set-up so that the CA has a basic understanding of the context of the call in order to better relay the call. We also seek

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[671] 47 C.F.R. § 64.604(c)(5)(iii)(H).

[672] *See* 47 C.F.R. 64.604((a)(1)(v) ("CAs answering and placing a TTY-based TRS or VRS call must stay with the call for a minimum of ten minutes."). This requirement is sometimes referred to as the "in-call replacement of CAs." *See Improved TRS Order & FNPRM* at ¶ 67.

[673] *See Improved TRS Order & FNPRM* at ¶¶ 67-69.

[674] We noted that we adopted a different standard for STS because of concerns unique to that service; in that case, it was to adopt a *longer* period of time. *See Improved TRS Order & FNPRM* at ¶ 70 (adopting a 15 minute period for STS CAs because "changing CAs can be particularly disruptive to users with speech disabilities").

[675] *See, e.g., Improved TRS Order & FNPRM* at ¶ 2; *Second Improved TRS Order & NPRM* at ¶ 5.

comment on how, if such questions are permitted, we may ensure that the VRS CA does not interfere with the independence of the caller should the caller choose to not answer the questions.

C. CERTIFICATION AND OVERSIGHT OF IP RELAY AND VRS PROVIDERS

250. As noted above, in the *Second Improved TRS Order & NPRM* we asked for comment on whether we should adopt rules whereby the Commission "certifies" providers as eligible to receive compensation from the Interstate TRS Fund. We have declined above to adopt any such new procedures at this time. Nevertheless, in view of the fact that we raise numerous issues in this *FNPRM* relating to the provision and compensation of IP Relay and VRS, we seek additional comment on whether the Commission, rather than the states, should "certify" and/or oversee providers of IP Relay and VRS to the extent they are eligible for compensation from the Interstate TRS Fund. We note that because for both of these services there are presently only a handful of national providers, which consumers can access via computer without regard to geographic location, it may be either unnecessary or unworkable to have all 50 states oversee these providers. We therefore seek comment on how the certification and oversight of IP Relay and VRS providers might fit with proposals for determining which calls are interstate and which are intrastate, as well as the possibility that they become mandatory services. We also seek comment on any other matters relating to the oversight and compensation of IP Relay and VRS providers under particular schemes we might adopt whereby states are responsible for the costs of intrastate IP Relay and VRS

D. TRS ADVISORY COUNCIL

251. In the 1993 *Third TRS Report & Order*, in which the Commission adopted the TRS cost recovery rules and appointed NECA as the interim Interstate TRS Fund administrator, the Commission also mandated the creation of an advisory committee to monitor cost recovery issues.[676] The Commission directed NECA to "establish a non-paid, voluntary advisory committee of persons from the hearing and speech disability community, TRS users (voice and text telephone), interstate service providers, state representatives, and TRS providers."[677] The Commission further directed that each group will select its own representative to the committee, and the committee will "meet at reasonable intervals (at least semi-annually) in order to monitor TRS cost recovery matters."[678] The Commission stated that this committee would be a safeguard in view of comments noting that NECA was associated with one specific industry group, local exchange carriers.[679] The Commission's creation of this advisory committee is reflected in the TRS regulations.[680] This committee is known as the TRS Advisory Council. Its bylaws state that its mission is to "advise the interstate TRS Fund Administrator on interstate TRS cost recovery matters."[681]

252. Since its inception, the TRS Advisory Council (Council) has met twice a year[682] to address matters concerning cost recovery and the Interstate TRS Fund. In addition, on several occasions the Commission has directed the Council, along with the TRS Fund Administrator, to develop cost

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[676] *Telecommunications Relay Services and the Americans with Disabilities Act of 1990*, Third Report and Order, CC Docket No. 90-571, FCC 93-357, 8 FCC Rcd 5300 at ¶ 8 (July 20, 1993) (*Third TRS Report & Order*).

[677] *Id.*

[678] *Id.*

[679] *Id.; see also id.* at ¶ 5.

[680] 47 C.F.R. § 64.604(c)(5)(iii)(H).

[681] *By-Laws of the Interstate TRS Fund Advisory Council*, adopted March 1995. In addition to monitoring the fund, the council has worked with the administrator to propose funding mechanisms for the various forms of TRS.

[682] 47 C.F.R. § 64.604(c)(5)(iii)(H).

recovery guidelines for various forms of TRS.[683] Further, the Council plays a role in the TRS Fund administrator's annual proposal of the compensation rates for traditional TRS, IP Relay, STS, and VRS. As a general practice, after receiving and analyzing the cost data provided by the TRS providers, the TRS Fund administrator consults with the Council for final review and approval of the proposed compensation rates before submitting them to the Commission on May 1st of each year.[684]

253. We now recognize the need to reevaluate the appropriate mission of the Council. First, we note that over a several year period the VRS compensation rate rose dramatically from $5.143 per minute to $17.044 per minute,[685] and that for the 2003-2004 fund year the VRS rate proposed by NECA was modified in the *Bureau TRS Order*.[686] We are cognizant of our fiduciary responsibility to ensure the integrity of the Interstate TRS Fund, and note that although the Council has members that are TRS users and TRS providers, it does not have any members that represent the TRS Fund or the consumers of interstate telecommunications services from whom the "costs of interstate [TRS] shall be recovered."[687] We therefore seek comment on whether the composition of the Council should be changed or expanded to include parties that represent the TRS Fund or any other relevant interests not currently represented on the Council.

254. More generally, we also seek comment on what the appropriate composition of the Council should be to ensure that all interested parties are fairly represented, and whether our rules should be amended in this regard. Further, we seek comment on whether a different nomination procedure should be adopted, instead of the current practice of self-nomination, to ensure that even among the identified groups there is broader opportunity for persons to be on the Council. Finally, we invite general comment on other ways in which the Council may play a more productive role in connection with the interstate TRS cost recovery scheme or, indeed, whether the Council is simply no longer necessary. We note that our rules do not elaborate the role of the Council other than to "monitor TRS cost recovery matters,"[688] and we ask whether the Council's role should be expanded to include advising the fund administrator and the Commission on other TRS issues.[689]

E. ABUSE OF COMMUNICATIONS ASSISTANTS (CAs)

255. In recent years, the Commission has been made aware of various instances where TRS calls – particularly IP Relay and VRS calls – are made that are either directly abusive to the CAs or involve abusive, sexually explicit, or threatening language directed to the called party that the CA is asked to relay. An example of the first scenario is where the TRS user, instead of calling the TRS facility to "speak" to the called party, calls the TRS facility and makes abusive remarks directed at the CA. Another example is when both parties to the TRS call engage in sexually explicit and abusive language solely to hear the CA repeat the language or to read the words as typed by the CA. In the second scenario, the CA may be asked to relay a call that is essentially an "obscene" call directed at the called party, a call that threatens the called party, or a call that discusses past or future criminal conduct. There are also relay calls that present other scenarios, such as inappropriate conduct or language that the CA either sees as the

[683] *See, e.g., TRS Cost Recovery Recommendations,* filed November 9, 2000; *IP Relay Cost Recovery Recommendations,* filed October 9, 2002.

[684] *See generally* 47 C.F.R. § 64.604(c)(5)(iii)(H).

[685] *See, e.g., Bureau TRS Order* at ¶29. The Commission noted that the VRS compensation rate jumped from approximately $5 per-minute to $17 per-minute in a two-year period.

[686] *Id.* at ¶ 32.

[687] 47 U.S.C. § 225(d)(3)(B).

[688] 47 C.F.R. § 64.604(c)(5)(iii)(H).

[689] *See generally Improved TRS Order & FNPRM* at ¶¶ 123-124 (noting discussion of quality issues).

call is relayed (with VRS) or must relay.[690] As a general matter, we seek comment on the scope of this problem, the extent to which existing laws may apply to the various scenarios, and whether there are any steps the Commission might take, consistent with section 225, our regulations, and other applicable laws (including the First Amendment) to ensure that CAs are not subject to abusive conduct or language, and to preclude, or minimize to the extent possible, abusive, harassing, or obscene TRS calls directed at the called party.

256. This issue, of course, is framed by the role of a CA as a transparent entity who relays calls between the TRS users to provide functionally equivalent telephone service. Central to the goal of functional equivalency are our rules prohibiting CAs from "intentionally altering a relayed conversation" and, to the extent that "it is not inconsistent with federal, state, or local law regarding the use of telephone facilities for illegal purposes," requiring CAs to "relay all conversations verbatim."[691] In view of these rules, TRS providers have generally understood that they must relay all calls regardless of content, and that it is not the role of the TRS provider or the CA to act as a censor for calls they may deem inappropriate. These rules, however, were enacted before a large percentage of TRS calls migrated to IP Relay and VRS, platforms that provide anonymity to the user because the initial leg of the call to the CA is via the Internet.

257. We initially addressed this matter in our *TRS I* order released in July 1991.[692] In addressing TRS "Confidentiality and Conversation Content," we noted that some commenters asserted that CAs should not be required to participate in "obscene or harassing calls."[693] We stated, however, that CAs are intended to be "transparent conduits relaying conversations without censoring or monitoring functions," and that section 225 provides that CAs may not divulge the content of any relayed conversation.[694] We noted that it is essential "that users of TRS can have confidence in the basic privacy of their conversations."[695] At the same time, we also noted other statutes permit or require disclosure in certain circumstances, citing section 705(a), which prohibits disclosure of any telephone conversation except under limited circumstances related to law enforcement.[696] The Commission concluded that the limited law enforcement exceptions to nondisclosure in section 705 applied to TRS, but emphasized that "except for these very limited exceptions, CAs are prohibited from divulging the content or existence of any relayed conversation."[697]

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[690] For example, a VRS CA may witness offensive and sexually graphic acts, or illegal acts (*e.g.*, domestic violence or child abuse), either by the VRS caller or by individual(s) in the VRS caller's background.

[691] *See* 47 U.S.C. § 225(d)(1)(F); 47 C.F.R. § 64.604(a)(2)(ii).

[692] *TRS I* at ¶¶ 11-15.

[693] *Id.* at ¶ 12.

[694] *Id.* at ¶ 13.

[695] *Id.*

[696] *See* 47 U.S.C. § 705 (Unauthorized Publication of Communications). Section 705(a) provides, in pertinent part, that "[e]xcept as authorized by chapter 119, title 18, United States Code, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority." *Id.* (footnote omitted). Section 705 notes that 18 U.S.C. § 2511(2) authorizes certain interception of communications by communications common carriers and by the Commission. *Id.* at n.1.

[697] *TRS I* at ¶ 14.

258. We also note that a TRS call, like any telephone call, is covered by section 223, which prohibits obscene or harassing telephone calls.[698] The fact that a TRS call directed to a called party is obscene (and therefore illegal), however, does not directly address the obligation the TRS facility or CA may have to handle such call in confidence, or whether the TRS facility or CA should be able to terminate or decline to handle such calls. We therefore seek comment on whether existing laws adequately address this issue, or whether the Commission should adopt TRS rules directed at curbing abusive calls directed at the CA or the called party. In particular, we seek comment on what types of calls might be deemed to fall outside the scope of a TRS call so that TRS providers could, consistent with our rules, refuse to handle such calls. We also seek comment on whether the TRS provider or CA should, in any particular context, be given the discretion to make the determination that a call is abusive and can be terminated. With regard to VRS in particular, we also seek comment on appropriate CA conduct during idle time, confidentiality with respect to what is seen on the screen, and any other issues concerning the appropriate behavior and language of VRS CAs. Finally, we seek comment or other suggestions on how abusive calls can appropriately and effectively be handled by the TRS providers, the CAs, and the state TRS programs.[699]

VII. PROCEDURAL MATTERS

A. *Ex parte* Presentations

259. This *FNPRM* is a permit-but-disclose notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, in accordance with the Commission's rules, provided that they are disclosed.[700]

B. Regulatory Flexibility Act

260. As required by the Regulatory Flexibility Act (RFA),[701] the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA), which is set forth in Appendix B. Also as required by the RFA,[702] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the *FNPRM*. The IRFA is set forth in Appendix C. Written public comments are requested on the IRFA. These comments must be filed by the deadlines for comment on the *FNPRM*, and should have separate and distinct headings designating them as responses to the IRFA. The Commission will send a copy of the *Second Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking* (*Order*), including the FRFA and IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

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[698] 47 U.S.C. § 223.

[699] In *TRS I*, we also addressed the potential liability of CAs during the use of TRS for illegal purposes. *TRS I* at ¶ 15. We analogized to the service obligations of common carriers, noting that as a general matter "common carriers will not be criminally liable absent knowing involvement in unlawful transmissions." *Id.* We stated that "CAs, in the normal performance of their duties, would generally not be deemed to have a 'high degree of involvement or actual notice of an illegal use' or be 'knowingly' involved in such illegal use." *Id.* Commenters may also wish to address how the issue of potential CA liability might affect the adoption of new rules governing the TRS provider's and CA's obligation to handle, or discretion not to handle, all calls regardless of content.

[700] *See generally* 47 C.F.R. §§ 1.1200, 1.1202, 1.1204, 1.1206.

[701] *See* 5 U.S.C. §§ 604. The RFA, *see* 5 U.S.C. §§ 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[702] *See* 5 U.S.C. § 603.

C. Paperwork Reduction Act

261. The *Report and Order* contains new, modified or proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified collection(s) contained in this item.

D. Comment and Reply Dates for FNPRM in CG Docket No. 03-123

262. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1415, 1.419, interested parties may file comments on or before 45 days after *Federal Register* publication, and reply comments on or before 75 days after *Federal Register* publication. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24,121 (1998).

263. Comments filed through the ECFS can be sent as an electronic file via the Internet to http://www.fcc.gov/e-file/ecfs.html. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Services mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, NATEK, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Room TW-A325 Washington, DC 20554.

264. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to: Dana Jackson, Federal Communications Commission, 445 12th Street, S.W., Room 6-C410, Washington DC 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Word 97 or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the lead docket number in this case, CG Docket No. 03-123, type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554.

VIII. ORDERING CLAUSES

265. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 1,2, 4(i), 4(j), 201-205, 218, and 225 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 201-205, 218, and 225, this REPORT AND ORDER, ORDER ON RECONSIDERATION, AND FURTHER NOTICE OF PROPOSED RULEMAKING are ADOPTED, and Part 64 of Commission's rules is AMENDED as set forth in the attached Appendix D, except that the requirements concerning the filing of annual reports subject to the PRA are not effective until approved by OMB. The Commission will publish a document in the *Federal Register* announcing the effective date of the reporting requirements

266. IT IS FURTHER ORDERED that Hamilton's Petition for Waiver Extension IS GRANTED to the extent indicated herein.

267. IT IS FURTHER ORDERED that Hands On's Petition for Waiver IS GRANTED to the extent indicated herein.

268. IT IS FURTHER ORDERED that Sprint's Petition for Declaratory Ruling, CC Docket No. 98-67 (filed May 27, 2003) (*711 Petition*) is GRANTED as provided herein.

269. IT IS FURTHER ORDERED that Hands On's Application for Certification as an Eligible VRS Provider (filed August 30, 2002) (*Hands On Application*) is DISMISSED without prejudice.

270. IT IS FURTHER ORDERED that Communication Services for the Deaf, Petition for Limited Waiver and Request for Expedited Relief, CC Docket 98-67 (filed June 12, 2003) (*CSD Petition*) is DENIED as provided herein.

271. IT IS FURTHER ORDERED that the petitions of AT&T, CSD, Hands On, Sorenson, and Sprint for reconsideration of the *Bureau TRS Order* are DENIED.

272. IT IS FURTHER ORDERED that the Interstate TRS Fund shall compensate VRS providers at the rate of $8.854 per completed interstate or intrastate conversation minute, which rate shall apply to the provision of eligible VRS services by eligible VRS providers effective September 1, 2003.

273. IT IS FURTHER ORDERED that interim per-minute compensation rates set forth in the *Bureau TRS Order* for traditional TRS, IP Relay, and STS are hereby adopted as the final compensation rates for such services for the period July 1, 2003, through June 30, 2004. These rates are $1.368 per completed interstate conversation minute for traditional TRS and per completed interstate or intrastate conversation minute for IP Relay; and $2.445 per completed interstate conversation minute for STS.

274. IT IS FURTHER ORDERED that, except as otherwise specifically provided herein, the *Bureau TRS Order* is AFFIRMED.

275. IT IS FURTHER ORDERED that petitions for reconsideration of *Telecommunication Relay Services and the Americans with Disabilities Act of 1990*, Fifth Report and Order, CC Docket No. 90-571, FCC 02-269, 17 FCC Rcd 21233 (Oct. 25, 2002) (*Coin Sent-Paid Fifth Report & Order*) are DENIED as provided herein.

276. IT IS FURTHER ORDERED that petitions for reconsideration of *Telecommunication Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Second Report and Order, CC Docket No. 98-67, FCC 03-112, 18 FCC Rcd 12379 (June 17, 2003) (*Second Improved TRS Order*) are GRANTED to the extent indicated herein.

277. IT IS FURTHER ORDERED that the amendments to sections 64.601 through 64.605 of

the Commission's rules as set forth in Appendix D ARE ADOPTED, effective thirty days from the date of publication in the *Federal Register*.

278. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this REPORT AND ORDER, ORDER ON RECONSIDERATION, AND FURTHER NOTICE OF PROPOSED RULEMAKING, including the Final Regulatory Flexibility Analysis and Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

279. To request materials in accessible formats (such as braille, large print, electronic files, or audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0531 (voice) or (202) 418-7365 (TTY). This *Order* can also be downloaded in Word and Portable Document (PDF) formats at http://www.fcc.gov/cgb.dro.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary